Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JAMES A. MCDERMOTT,

Petitioner,

v.

JOHN A. BOEHNER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

FRANK CICERO, JR., P.C.
KIRKLAND & ELLIS LLP
200 East Randolph Dr.
Chicago, IL 60601

CHRISTOPHER LANDAU, P.C.
Counsel of Record
EDWIN JOHN U
PADRAIC B. FENNELLY
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit flouted this Court's decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), by applying the federal wiretapping statute, 18 U.S.C. § 2511(1)(c), to punish a disclosure of truthful information on a matter of public concern by someone not involved in unlawful wiretapping.

2. Whether the D.C. Circuit violated the separation of powers by punishing a Member of Congress under the federal wiretapping statute based on an alleged violation of an internal rule of the U.S. House of Representatives.

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INTRODUCTION

Over six years ago, this Court held that the federal wiretapping statute violates the First Amendment as applied to punish the disclosure of truthful information on a matter of public concern by someone not involved in unlawful wiretapping. *See Bartnicki v. Vopper*, 532 U.S. 514 (2001). That holding not only resolved an "important question" under the First Amendment, *id.* at 517, but also "resolve[d] the conflict" between the Third Circuit's decision in that case and the D.C. Circuit's prior decision in this case, *id.* at 522. The *Bartnicki* Court endorsed the Third Circuit's approach, and accordingly affirmed the Third Circuit's judgment, *see id.* at 535, while granting the petition for certiorari in this case, vacating the D.C. Circuit's judgment, and remanding this case for further proceedings, *see McDermott v. Boehner*, 532 U.S. 1050 (2001).

By a 5-4 vote, the *en banc* D.C. Circuit has now blasted a gaping hole into *Bartnicki*. According to the majority, *Bartnicki*'s First Amendment limitations on the federal wiretapping statute's nondisclosure duty magically vanish when that statute is invoked against someone who has violated some *other* nondisclosure duty. Because Rep. McDermott supposedly violated a nondisclosure duty imposed by the Ethics Committee of the U.S. House of Representatives, the D.C. Circuit majority declared, he constitutionally may be punished for violating the federal wiretapping statute's nondisclosure duty notwithstanding *Bartnicki*.

That conclusion, as Judge Sentelle explained in dissent, is a *non sequitur*. Whether Rep. McDermott violated a nondisclosure duty to the House Ethics Committee and whether he constitutionally may be punished for any such violation has nothing to do with whether Rep. McDermott violated the nondisclosure duty in the federal wiretapping statute and whether he constitutionally may be punished for any such violation.

This case, after all, arises under the federal wiretapping statute, not the House Ethics Committee Rules. Thus, as Judge Sentelle put it, "[w]e are reviewing a case governed by *Bartnicki*, and *Bartnicki*'s holding should prevail." App. 28a.

Indeed, the D.C. Circuit majority's attempt to avoid *Bartnicki* led that court into even deeper constitutional error. The alternative duty invoked by the D.C. Circuit as the basis for sidestepping *Bartnicki* is not just *any* nondisclosure duty: it is an internal nondisclosure duty imposed by the Legislative Branch of the Federal Government upon its own Members. Under bedrock separation of powers principles, the Judicial Branch is not in the business of adjudicating—much less punishing—violations of the internal rules of the Legislative Branch. And that point is particularly compelling here, given that the House Ethics Committee itself decided that Rep. McDermott's alleged violation of its internal rules did *not* warrant punishment, and declined even to refer the matter to a special subcommittee responsible for adjudicating violations of Ethics Committee rules. By concluding that Rep. McDermott could be punished under the federal wiretapping statute based solely on his supposed violation of an internal House rule, the D.C. Circuit majority transgressed its constitutional authority and intruded into the legislative sphere.

The sharply divided *en banc* decision below thus flouts the authority not only of this Court, by evading *Bartnicki*, but also of Congress, by adjudicating a violation of an internal House rule. And the irony is that only a single judge on the D.C. Circuit thought that the House Rules should be dispositive here. Four of the nine judges below thought that *Bartnicki* governed this case, and required judgment in Rep. McDermott's favor, *see* App. 15-30a (Sentelle, J., dissenting), while four other judges thought that *Bartnicki* did not apply here in the first place, *see id.* at 7a n.1. Only Judge Griffith thought that *Bartnicki* applied here but that Rep. McDermott nonetheless may

be punished, and Judge Griffith cast the deciding vote. *See id.* at 14a (concurring opinion). That is no way to leave the law on such important constitutional issues. Indeed, the fact that the D.C. Circuit was so deeply divided as to produce two rival majorities in this case (after no fewer than five rounds of briefing and argument, including two separate *en banc* arguments) only underscores that this Court's review is warranted. Accordingly, this Court should once again grant certiorari in this case, and reaffirm that *Bartnicki* means what it says.

OPINIONS BELOW

The D.C. Circuit's *en banc* decision is reported at 484 F.3d 573 and reprinted in the Appendix ("App.") at 1-30a. The D.C. Circuit's unpublished order calling for supplemental *en banc* briefing and argument is reprinted at App. 31-32a. The D.C. Circuit's unpublished order granting *en banc* review is reprinted at App. 33-34a. The D.C. Circuit's prior panel decision is reported at 441 F.3d 1010 and reprinted at App. 35-56a. The district court's decision granting respondents' motion for summary judgment on liability is reported at 332 F. Supp. 2d 149 and reprinted at App. 57-92a. The district court's unpublished order memorializing that decision is reprinted at App. 93a. The district court's unpublished order on damages is reprinted at App. 94-112a.

JURISDICTION

The D.C. Circuit rendered its *en banc* decision on May 1, 2007. App. 1a. On July 24, 2007, Justice Stevens granted petitioner's application to extend the time within which to file a petition for a writ of certiorari to September 28, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE

The following constitutional and statutory provisions and rule are pertinent to this case:

The First Amendment to the Constitution provides in relevant part that "Congress shall make no law ... abridging the freedom of speech, or of the press ...." U.S. Const. amend. I.

The Rulemaking Clause of the Constitution provides in relevant part that "Each House may determine the Rules of its Proceedings [and] punish its Members for disorderly Behaviour." U.S. Const. Art. I, § 5, cl. 2.

The federal wiretapping statute provides in relevant part:

> Except as otherwise specifically provided in this chapter any person who—
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication ....
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through

> the interception of a wire, oral, or electronic communication in violation of this subsection; ....
>
> shall be punished ....

18 U.S.C. § 2511;

> Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

18 U.S.C. § 2520(a).

Rule 9 of the House Ethics Committee, at the time relevant here, provided that "Committee members and staff shall not disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee."

Rule 9, Committee on Standards of Official Conduct, U.S. House of Representatives, 104th Congress (1995-96).

STATEMENT OF THE CASE

A. Background

This case arises out of a conference call held by then-Speaker of the U.S. House of Representatives Newt Gingrich and several of his political allies on December 21, 1996, to prepare a response to an Ethics Committee investigation into alleged improprieties. *See* App. 3a.[1] Respondent John Boehner, a Member of Congress from

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[1] Because this appeal arises from the grant of a motion for summary judgment in respondent's favor, all factual inferences must be drawn in petitioner's favor. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Ohio, participated in that call in his capacity as Chairman of the House Republican Conference, *see id.*, the fourth-ranking position in the House Republican leadership. Rep. Boehner, who was then visiting Florida, used a cellular telephone to participate in the call. *Id.*

A Florida couple, John and Alice Martin, heard the call over a radio scanner and taped it. *Id.* Several weeks later, on January 8, 1997, the Martins traveled to Washington, D.C., and went to the House of Representatives. *Id.* In a public anteroom of the House Ethics Committee, they approached petitioner James McDermott (a Member of Congress from Washington, and then the Ranking Democrat on the House Ethics Committee), introduced themselves, and handed him an envelope. App. 4a; *see also* Dep. of Rep. James A. McDermott ("McDermott Dep."), C.A. App. 73-74. The Martins told Rep. McDermott that the envelope contained a tape that would be of interest to him, and asked him to listen to it. *Id.* Rep. McDermott said that he would. *Id.*

Before that encounter, neither Rep. McDermott, nor his staff, nor anyone acting on his behalf had any knowledge of the Martins or the tape. *See* Decl. of James A. McDermott ("McDermott Decl."), C.A. App. 199. Rep. McDermott had never met the Martins, did not know who they were, and did not know why they wanted to meet him. *See* McDermott Dep., C.A. App. 77; McDermott Decl., C.A. App. 199. When the Martins handed Rep. McDermott the envelope and said that it contained a tape, they did not tell him what was on the tape or why they were giving it to him. McDermott Dep., C.A. App. 74, 78, *see also* McDermott Decl., C.A. App. 199.

Accordingly, Rep. McDermott had no idea what was on the tape when he accepted the envelope from the Martins. "I knew nothing about that tape when it was handed to me. Nothing." McDermott Dep., C.A. App. 79; *see also id.* at 79-80 ("I didn't know anything about where [the tape] came from. I didn't know that they had done it.

They brought me a tape and said they thought I'd be interested in it or should listen to it. And that's all I knew. I didn't know anything else."); *id.* at 78 ("I had no knowledge of what was on the tape. I didn't have any reason to believe or to think or draw any conclusions."); McDermott Decl., C.A. App. 199 ("I had no idea what the tape contained when the Martins handed it to me, because they never discussed its contents with me."). As Rep. McDermott explained:

> In 30 years of being involved in public life you're often handed things by people, which you accept, put in your pocket, and move on. And that's precisely what I had here. I didn't know who these people were. I had no understanding of what they were doing. ...

McDermott Dep., C.A. App. 77. Neither Rep. McDermott, nor his staff, nor anyone acting on his behalf ever communicated with the Martins after that single brief encounter. *See* McDermott Decl., C.A. App. 200.

Although the Martins had prepared a transmittal letter stating that the envelope contained the tape of a conversation heard over a radio scanner, Rep. McDermott did not read any such letter during his brief encounter with them. Rather, as he testified without contradiction, the Martins simply handed him an 8-1/2" by 11" envelope and told him that it contained a tape that he would find interesting. *See* McDermott Dep., C.A. App. 73-74. Indeed, Rep. McDermott testified that he does not recall even *seeing* the transmittal letter during his encounter with the Martins. *See, e.g., id.* at 72 ("Q. Okay. And just so I'm clear, you can't remember seeing it on January 8th, when you met with the Martins, correct? A. Yes.").

Several hours later, after Rep. McDermott returned to his office, he opened the envelope the Martins had handed to him, turned it over, and shook out a tape cassette. *See id.* at 75. When he listened to the tape, Rep. McDermott recognized some of the voices on it, including then-

Speaker Gingrich's voice. *See id.* at 79. From the tape, Rep. McDermott learned for the first time that, as part of a settlement of ethics charges against him, the Speaker had agreed not to participate in any efforts to spin the settlement agreement in a favorable light. *See id.* at 37, 42. Rep. McDermott believed that the tape—in which the Speaker and his political allies discussed how to orchestrate a spin campaign in apparent violation of that agreement—had obvious importance to the public. *See id.* at 36, 49.

Rep. McDermott then called two reporters, Adam Clymer of *The New York Times* and Jeanne Cummings of *The Atlanta Journal-Constitution*, and invited them separately to his office. *See id.* at 80, 82. He gave each reporter an opportunity to listen to the tape. *See id.* at 81-82.

On Friday, January 10, 1997, *The New York Times* ran a front-page article describing the recorded conversation. The article explained that the conversation included a strategy session about how "to limit political fallout" from the Gingrich ethics investigation, in apparent violation of the agreement between the Speaker and the Ethics Committee. The article also included excerpts from the tape. Similar stories later ran in *The Atlanta Journal-Constitution* and *Roll Call*. None of these articles mentioned Rep. Boehner.

The U.S. Department of Justice thereafter launched a criminal investigation into the interception and disclosure of the tape. On April 23, 1997, the Martins were charged with the unlawful interception of a cellular telephone call, in violation of 18 U.S.C. §§ 2511(1)(a), 2511(4)(b)(ii). *See* U.S. Department of Justice Press Release, *Martins Charged in Cell Phone Case*, Apr. 23, 1997, C.A. App. 20-21. As the Justice Department explained, "[b]ecause the interception involved the radio portion of a cellular telephone communication, and because there is no evidence that the interception was for a tortious or illegal

purpose or for purposes of direct or indirect commercial advantage or private financial gain, the U.S. Code classifies this offense as an infraction." *Id.* Each of the Martins pleaded guilty, and was fined $500. *See* U.S. Department of Justice Press Release, *Martins Plead Guilty and Are Sentenced in Cell Phone Case*, Apr. 25, 1997, C.A. App. 22. The United States did not charge the Martins with the unlawful disclosure (as opposed to interception) of the communication, and never brought any charges against Rep. McDermott, *The New York Times*, or any other person or entity.

B. Procedural History

1. Round One

Rep. Boehner filed this lawsuit in March 1998, charging Rep. McDermott with the disclosure of an unlawfully intercepted communication in violation of the federal wiretapping statute, 18 U.S.C. §§ 2511(1)(c), 2520. The complaint did not name the Martins or any media outlet as a defendant, did not allege that Rep. Boehner had suffered any injury from the disclosure, and did not seek compensatory damages.

In July 1998, the district court (Hogan, J.) dismissed the complaint on the ground that the application of the federal wiretapping statute to this case would violate the First Amendment by punishing the disclosure of truthful and lawfully obtained information on a matter of public importance. *See Boehner v. McDermott*, No. CIV. 98-594, 1998 WL 436897 (D.D.C. July 28, 1998). In so doing, the court relied on a line of this Court's cases holding that the First Amendment forbids the government from punishing the disclosure of truthful and lawfully obtained information absent a need to further a governmental interest of the highest order. *Id.* at *5 (citing, *inter alia*, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979)).

Rep. Boehner appealed, and the United States intervened to support the constitutionality of the federal statute as sought to be applied here. A fractured panel of the D.C. Circuit reversed. *See Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999). Judge Randolph, writing for himself, concluded that this case did not involve speech at all, but only conduct. *See id.* at 466-67 (opinion of Randolph, J.). Both Judge Randolph and now-Chief Judge Ginsburg also concluded that Rep. McDermott had not "lawfully obtained" the information even though he broke no law by receiving it. *Id.* at 475-76 (opinion of Randolph, J.); 479-80 (opinion of Ginsburg, J.). Because it was unlawful for the Martins to disclose the tape, under this view, Rep. McDermott participated in an "illegal transaction" by receiving the tape from them. *Id.* Judge Sentelle dissented from the panel's decision, *see id.* at 480-86, and both Judges Sentelle and Tatel dissented from the denial of rehearing *en banc*.

Rep. McDermott and the plaintiffs in a similar case from the Third Circuit, *Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), filed petitions for certiorari in this Court at about the same time. This Court granted certiorari in *Bartnicki* "to resolve the conflict" between the Third Circuit's decision in that case and the D.C. Circuit's decision in this case on an "important" issue of First Amendment law. *See* 532 U.S. at 517, 522.

This Court ultimately affirmed the Third Circuit's decision in *Bartnicki*, declaring that "we are firmly convinced that the disclosures made by respondents in this suit are protected by the First Amendment." *Id.* at 518. The Court specifically "accept[ed] petitioners' submission that the interception was intentional, and therefore unlawful, and that, at a minimum, respondents 'had reason to know' that it was unlawful." *Id.* at 525. Even though the *Bartnicki* respondents were deemed to have satisfied the statutory *scienter* requirement, the Court held that "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be

suppressed in order to deter conduct by a non-law-abiding third party." *Id.* at 529-30. Thus, because the *Bartnicki* respondents "played no part in the illegal interception," the First Amendment did not allow them to be punished for disclosing that information *regardless* of their knowledge of illegal conduct by others. *Id.* at 525.

The Court then granted Rep. McDermott's petition for certiorari, vacated the D.C. Circuit's judgment, and remanded this case. *See McDermott v. Boehner*, 532 U.S. 1050 (2001). Consistent with its representation to this Court that "*Bartnicki* is indistinguishable from this case," Br. for United States at 15, *McDermott v. Boehner* (U.S. No. 99-1709) (internal quotation omitted), the United States (which had defended the constitutionality of the statute through briefing and argument in both this case and *Bartnicki*) declined to participate on remand. After a new round of briefing and oral argument, the D.C. Circuit *sua sponte* remanded the case to the district court for Rep. Boehner to amend his complaint in light of *Bartnicki*. *See Boehner v. McDermott*, No. 98-7156, 2001 WL 1699420 (D.C. Cir. Dec. 21, 2001) (*per curiam*).

2. Round Two

Rep. Boehner's amended complaint asserted the same claims as the original complaint, *see* Am. Compl., C.A. App. 10-19, and discovery established that Rep. Boehner could not avoid *Bartnicki* by proving that Rep. McDermott was involved in any way in the Martins' unlawful interception of a protected communication.

Notwithstanding *Bartnicki*, however, the district court invoked the "residual authority" of the D.C. Circuit's vacated decision, App. 68a, and granted Rep. Boehner's motion for summary judgment, *see* App. 57-92a. Even though *Bartnicki* expressly assumed that the defendants there knew or had reason to know that the tape had been unlawfully intercepted, the district court purported to distinguish *Bartnicki* on the ground that Rep. McDermott knew or had reason to know that the tape had been

unlawfully intercepted. In particular, the court drew a dispositive distinction between knowledge at the time of *receipt* versus knowledge at the time of *disclosure*. App. 80-84a, 90-91a. The court then concluded that there was no genuine issue of material fact as to Rep. McDermott's knowledge of the Martins' unlawful conduct at the time he received the tape from them, despite his sworn testimony to the contrary. App. 84-90a.

After granting summary judgment in Rep. Boehner's favor on liability, the district court ordered Rep. McDermott to pay statutory damages of $10,000, punitive damages of $50,000, and attorneys' fees and costs. App. 94-112a. Although the court has not yet calculated such fees and costs, Rep. Boehner has most recently estimated them at approximately $880,000.

Rep. McDermott appealed. Over Judge Sentelle's dissent, the previous panel assigned the case to itself, and—by a 2-1 vote—affirmed the grant of summary judgment in Rep. Boehner's favor. *See* App. 35-56a. The majority opinion (authored by Judge Randolph) concluded that *Bartnicki* does not apply to "a person who knowingly receives a tape from an illegal interceptor." App. 42a. The majority then held that the undisputed evidence here established that Rep. McDermott either knew or had reason to know the tape had been unlawfully intercepted when he received it. App. 42-45a. Judge Sentelle again dissented, noting that *Bartnicki* "decided the very issue of this case," and dismissing the majority's attempted distinction of *Bartnicki* as "artificial." App. 53a (dissenting opinion).

Upon Rep. McDermott's motion, the D.C. Circuit then granted *en banc* review. App. 33-34a. At the *en banc* oral argument, Rep. Boehner not only endorsed the panel majority's distinction of *Bartnicki*, but pressed an alternative theory under *United States v. Aguilar*, 515 U.S. 593 (1995). According to Rep. Boehner, that case stands for the proposition that nondisclosure duties may

be imposed on "[p]eople who are in sensitive confidential positions," even if those duties could not be imposed on unwilling members of the general public. C.A. Tr. Oral Arg. (10/31/06), at 41. Rep. Boehner argued Rep. McDermott was in such a position at the time of his disclosure by virtue of his membership on the House Ethics Committee, and thus could be punished notwithstanding *Bartnicki*. *See id.* On December 5, 2006, the *en banc* D.C. Circuit *sua sponte* issued an order requesting supplemental briefing and argument "limited to the issue whether *United States v. Aguilar*, 515 U.S. 593 (1995), limits First Amendment protection of McDermott's disclosure." App. 32a.

The very next day, the Investigative Subcommittee of the House Ethics Committee, which had been reviewing an ethics complaint filed against Rep. McDermott in November 2004 by Rep. David Hobson based upon the disclosure at issue in this lawsuit, issued a Report to the Ethics Committee. App. 113-45a. Under the Ethics Committee Rules, an Investigative Subcommittee determines whether "there is substantial reason to believe that a violation of the Code of Official Conduct, or of a law, rule, regulation, or other standard of conduct ... has occurred." Rule 19(f), Committee on Standards of Official Conduct, U.S. House of Representatives, 109th Congress (2005-06). If so, the Investigative Subcommittee issues a "Statement of Alleged Violation" (essentially an indictment), and the matter proceeds to an Adjudicatory Subcommittee, which "holds an adjudicatory hearing and determines whether the counts in a Statement of Alleged Violation are proved by clear and convincing evidence." Rule 2(f), Committee on Standards of Official Conduct, U.S. House of Representatives, 109th Congress (2005-06).

Here, the Investigative Subcommittee did not adopt any Statement of Alleged Violation regarding Rep. McDermott, and thus did not charge him with having violated any law, rule, regulation, or other standard of conduct (or give him a chance to defend himself against

any such charge before the Adjudicatory Subcommittee). Rather, the Report stated *only that* "Representative McDermott's conduct, *i.e.*, his disclosure to the news media of the contents of the tape furnished to him by the Martins, was inconsistent with the *spirit* of the applicable rules and represented a failure on his part to meet his *obligations as Ranking Minority Member* of the House Select Committee on Ethics." App. 142a (emphasis added). The Investigative Subcommittee simply sent its Report to the full Ethics Committee, noting that it had "decided against further proceedings in this matter," and "additionally recommends that the Report of the Investigative Subcommittee be released to the public with no further statement by the Committee beyond announcing release of this Report." App. 145a. The full Ethics Committee adopted the Report on December 8, 2006, and publicly released it on December 11, 2006. App. 113a, 146a.

After the parties to this lawsuit filed supplemental briefs and the *en banc* D.C. Circuit heard a second oral argument, the court rendered a splintered decision. A 5-4 majority agreed with Rep. McDermott that *Bartnicki* applied here because Rep. McDermott had lawfully obtained the tape, even though the Martins had not. *Compare* App. 17-24a *with* App. 7a n.1. But then a different 5-4 majority held that Rep. McDermott had violated a nondisclosure duty in the House Rules, and hence could be punished for violating the nondisclosure duty in the federal wiretapping statute notwithstanding *Bartnicki*. *Compare* App. 7-13a *with* 24-30a. Judge Griffith provided the swing vote. *See* App. 14a.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The D.C. Circuit Flouted *Bartnicki* By Applying The Federal Wiretapping Statute To Punish A Disclosure Of Truthful Information On A Matter Of Public Concern By Someone Not Involved In Unlawful Wiretapping.

The premise of our hierarchical judicial system is that "a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (*per curiam*); *see also Hubbard v. United States*, 514 U.S. 695, 713 n.13 (1995) ("We would have thought it self-evident that the lower courts must adhere to our precedents."). The decision below, whether "consciously or unconsciously," calls that premise into question, and thereby threatens "the hierarchy of the federal court system created by the Constitution and Congress." *Hutto*, 454 U.S. at 375.

This Court held in *Bartnicki* that the federal wiretapping statute violates the First Amendment as applied to punish a disclosure of truthful information on a matter of public concern by someone not involved in unlawful wiretapping—even if the person knew or had reason to know that the information had been unlawfully intercepted by someone else. 532 U.S. at 525-35; *see also* App. 17-24a; *Jean v. Massachusetts State Police*, 492 F.3d 24, 32 (1st Cir. 2007). That holding should have been the beginning and the end of this case. Rep. McDermott, like the respondents in *Bartnicki*, was sued under the nondisclosure provision of the federal wiretapping statute for disclosing truthful information on a matter of public concern. And, again as in *Bartnicki*, there was no evidence here of any involvement in the underlying interception.

Nonetheless, a 5-4 majority of the *en banc* D.C. Circuit purported to distinguish *Bartnicki* on the ground that Rep. McDermott violated a duty of nondisclosure under

the House Ethics Committee Rules. App. 7-13a. But that is a classic distinction without a difference. This case is not about the duty of nondisclosure under the House Ethics Committee Rules. No one here is trying to punish Rep. McDermott under the House Ethics Committee Rules (and the House itself tellingly declined to do so). Rather, this case is about the duty of nondisclosure in the federal wiretapping statute, 18 U.S.C. § 2511(1)(c). Rep. Boehner is trying to punish Rep. McDermott for violating the duty of nondisclosure in that criminal statute. *See* App. 28a (Sentelle, J., dissenting) ("[W]e are charged with determining the constitutionality of applying § 2511 in circumstances directly paralleling those considered by the Supreme Court in *Bartnicki*.").

Indeed, in his original pre-*Bartnicki* decision in this case, Judge Randolph, author of the *en banc* majority opinion below, was utterly explicit on this point. He emphasized that "McDermott ... obtained the tape under a duty of nondisclosure. In his case the duty arose from a statute—§ 2511(1)(c)." *Boehner v. McDermott*, 191 F.3d at 477 (opinion of Randolph, J.); *see also id.* at 478 ("[McDermott] had a duty ... of nondisclosure. The duty stemmed of course from every citizen's responsibility to obey the law, of which § 2511(1)(c) is a part.") (opinion of Randolph, J.).

It is no answer to say, after this Court declared the nondisclosure duty in § 2511(1)(c) unconstitutional as applied to persons who (like Rep. McDermott) were not involved in unlawful wiretapping, that this case is now about a different duty after all. Legal duties are not interchangeable at will. If, as *Bartnicki* establishes, the nondisclosure duty in § 2511(1)(c) is unconstitutional as applied to persons not involved in an unlawful interception, this case is over. The constitutionality of *that* nondisclosure duty as applied here cannot possibly turn on the constitutionality of some *other* nondisclosure duty as applied here, because no other nondisclosure duty is being applied here.

The majority below thus erred by asserting that "[i]f the First Amendment does not protect Representative McDermott from House disciplinary proceedings, it is hard to see why it should protect him from liability in this civil suit." App. 11a; *see also id.* ("Either he had a First Amendment right to disclose the tape to the media or he did not."). Under this approach, if Rep. McDermott violated a nondisclosure duty under the House Ethics Committee Rules, he constitutionally may be punished for violating any *other* nondisclosure duty. That "mix and match" approach has no basis in law, and hence provides no plausible ground for avoiding *Bartnicki*.

Constitutional rights, after all, do not exist in a vacuum. Thus, the fact that particular speech may be punished under *some* law without violating the First Amendment does not mean that the speech may be punished under *any* law without violating the First Amendment. *See, e.g., R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382-90 (1992) ("fighting words" that generally may be punished without violating the First Amendment may not be punished under statute discriminating between different categories of "fighting words"). To the contrary, it is a commonplace of First Amendment law that certain restrictions may violate free speech rights, even if other restrictions would not violate those same rights. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418-31 (1993) (invalidating municipal ordinance limiting speech because of the way it was written without foreclosing possibility that properly written ordinance could limit the speech); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129-37 (1992) (same). The First Amendment, in other words, does not cease to protect particular speech in *all* circumstances just because it may not protect that speech in *some* circumstances.

The D.C. Circuit's view that "[e]ither [Rep. McDermott] had a First Amendment right to [speak] or he did not," App. 11a, however, means that the First

Amendment does not protect the speech at issue here precisely because it may not protect that same speech everywhere. Under this view, as long as Rep. McDermott constitutionally may be punished for violating a nondisclosure duty under the House Rules, he constitutionally may be punished for violating any *other* nondisclosure duty, even one that is otherwise unconstitutional—like the nondisclosure duty in § 2511(1)(c) as applied in *Bartnicki* and here, or, for example, a nondisclosure duty applicable only to disclosures embarrassing to Republicans but not Democrats. That is not, and never has been, the law. *See, e.g., R.A.V.*, 505 U.S. at 384 ("[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.") (emphasis in original).

In effect, the decision below collapses the distinction between facial and as-applied challenges under the First Amendment. If it were true that a First Amendment challenge to a particular limitation on speech fails if that speech constitutionally may be limited in *any* circumstance, then a party bringing an as-applied challenge to a limitation on speech would have to show that the limitation was unconstitutional in *all* circumstances, which is the very essence of a facial challenge. *See, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1987). That is simply not the law. To the contrary, a party bringing an as-applied challenge needs only to show that a particular restriction is unconstitutional as applied to him, even if that restriction would not be unconstitutional as applied to someone else, or some other restriction would not be unconstitutional as applied to him. *See, e.g., Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803 & n.22 (1984). Settled law thus recognizes that a particular restriction on speech may be unconstitutional as applied in particular circumstances, even if it is not unconstitutional on its face. "'The fact that a law is

capable of valid applications does not necessarily mean that it is valid as applied to these litigants.'" *FEC v. Wisconsin Right To Life, Inc.*, 127 S. Ct. 2652, 2670 n.8 (2007) (quoting *Taxpayers for Vincent*, 466 U.S. at 803 n.22); *see also Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006) (*per curiam*); *McConnell v. FEC*, 540 U.S. 93, 157 n.52, 159, 173, 244 (2003).

Aguilar in no way conflicts with that settled law. Indeed, *Aguilar* is a statutory case that addressed the First Amendment only tangentially. *See* 515 U.S. at 602-05. There, a federal district judge notified the target of a federal criminal probe that his telephone was being wiretapped. *See id.* at 596. The judge was later convicted of violating a statute authorizing the punishment of anyone who, "having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization ... to intercept a wire, oral, or electronic communication, *in order to obstruct, impede, or prevent such interception*, gives notice or attempts to give notice of the possible interception to any person." 18 U.S.C. § 2232(c) (1994) (emphasis added). The judge challenged his conviction on the ground that the statute did not cover his disclosure, and invited this Court to construe the statute narrowly "because of a concern that a broader construction would run counter to the First Amendment." 515 U.S. at 605.

This Court rejected that invitation. The Court began its constitutional-avoidance analysis by acknowledging the principle that "the Government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a 'state interest of the highest order.'" *Id.* (quoting *Daily Mail*, 443 U.S. at 103). That principle did not apply in *Aguilar*, the Court explained, because "the statute here in question does not impose such a restriction generally, but only upon those who disclose wiretap information 'in order to obstruct, impede, or prevent' the interception." *Id.* (quoting 18 U.S.C. § 2232(c)). *Aguilar* thus supports,

rather than undermines, the settled point that whether a particular nondisclosure duty passes First Amendment muster turns not on the existence of an abstract "First Amendment right to disclose" under any and all circumstances, App. 11a, but instead on the scope and context of the particular nondisclosure duty at issue.

To be sure, the *Aguilar* Court also observed that Judge Aguilar was not "simply a member of the general public who happened to lawfully acquire possession of information about the wiretap; he was a Federal District Court Judge who learned of a confidential wiretap application from the judge who had authorized the interception, and who wished to preserve the integrity of the court." 515 U.S. at 605-06. As the Court explained, "[g]overnment officials in sensitive confidential positions may have special duties of nondisclosure." *Id.* at 606 (citing Fed. R. Crim. P. 6(e) (prohibiting the disclosure of grand jury information)). "As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." *Id.* (citing *Snepp v. United States*, 444 U.S. 507 (1980) (*per curiam*)). But, as Judge Sentelle noted below, this is hardly an endorsement of the notion that a person subject to *one* valid nondisclosure duty may constitutionally be punished under *any* nondisclosure duty. Rather, "[t]he statute at issue in *Aguilar* was closely connected with the 'special duty of nondisclosure' that limited the defendant's First Amendment rights," whereas the nondisclosure duty in § 2511(c) "is unrelated to whatever 'special duty of nondisclosure' McDermott may have had as a member of Congress." App. 28a (Sentelle, J., dissenting). In short, "[i]t does not follow that Representative McDermott's violation of a House Committee rule deprives him of a First Amendment defense to every other nondisclosure law." *Id.*

Thus, whether Rep. McDermott constitutionally may be punished for violating a nondisclosure duty imposed by the House Ethics Committee does not answer the question whether Rep. McDermott constitutionally may be punished for violating the distinct nondisclosure duty imposed by the federal wiretapping statute. The former question is not presented by this case, and the latter question is answered by *Bartnicki*.

Once a 5-4 majority of the *en banc* D.C. Circuit concluded that *Bartnicki* applied here, *see* App. 17-24a, in other words, there was no basis for another 5-4 majority of the *en banc* D.C. Circuit to reject Rep. McDermott's First Amendment defense. The lower courts are obviously entitled to try to distinguish this Court's precedents, and in appropriate cases to reaffirm a judgment vacated and remanded by this Court, but not to avoid this Court's rulings based on insubstantial distinctions. *See, e.g.*, *Williams v. Planned Parenthood Shasta-Diablo, Inc.*, 520 U.S. 1133, 1136 (1997) (Scalia, J., joined by Kennedy and Thomas, JJ., dissenting from denial of certiorari) ("[W]e should in my view always be disposed to [carefully scrutinize lower court decisions] when the grounds are newly minted after a remand, contradict what was said before the remand, and bear indication of an attempt to evade the consequences of our holding prompting the remand," especially where "the abridgment of First Amendment rights [is] at issue."). That point is particularly compelling here, given that this Court granted certiorari in *Bartnicki* itself for the very purpose of "resolv[ing] the conflict" between the Third Circuit's decision in that case and the D.C. Circuit's initial decision in this case. 532 U.S. at 522.

If, as *Bartnicki* holds, § 2511(1)(c) violates the First Amendment as applied to punish the disclosure of truthful information on a matter of public concern by someone not involved in the underlying interception, *see* 532 U.S. at 525-35, a lower court may not avoid that constitutional holding by simply importing *another*

nondisclosure duty into a § 2511(1)(c) case. Thus, if Rep. McDermott may not constitutionally be punished for violating the nondisclosure duty in § 2511(c)(1), he may not constitutionally be punished under § 2511(c)(1). That proposition, which has the virtue of being both simple and true, disposes of this case. The result here should be no different depending on whether the defendant is Rep. McDermott, *The New York Times*, or anyone else.

Indeed, the implications of the D.C. Circuit's contrary approach are staggering. The *Bartnicki* Court thought it was deciding an "important question" of First Amendment law, 532 U.S. at 517, but the decision below threatens to turn the rule into the exception. The D.C. Circuit identified no limiting principle to its theory that the nondisclosure duty in § 2511(c)(1) may be enforced against persons otherwise protected by *Bartnicki* if they are subject to some *other* nondisclosure duty, and no such limitation is apparent. What other kinds of nondisclosure duties may be indirectly enforced via § 2511(1)(c)? Are they only legal duties, or also ethical and/or professional duties? If an employee violates a duty of confidentiality to his company by disclosing corporate misdeeds, does that mean not only that he may be fired, but also that he is stripped of any First Amendment defense to a subsequent libel action? The bottom line here is that the D.C. Circuit avoided *Bartnicki* only by embracing a radical and unfounded lowest-common-denominator approach to the First Amendment, so that now more than ever this case presents an "important question" of First Amendment law, *Bartnicki*, 532 U.S. at 517, worthy of this Court's review.

II. The D.C. Circuit Violated The Separation Of Powers By Punishing A Member Of Congress Under The Federal Wiretapping Statute Based On An Alleged Violation Of An Internal House Rule.

By straining to evade *Bartnicki*, moreover, the D.C. Circuit flouted not only this Court's authority over constitutional law, but also Congress' authority over its own internal discipline. Even if it were permissible as a general matter to salvage the constitutionality of the nondisclosure duty in § 2511(1)(c) by reference to some other nondisclosure duty, it is not permissible for the courts to enforce, directly or indirectly, an internal duty imposed by Congress upon its Members. To the contrary, the Rulemaking Clause of the Constitution expressly gives Congress the exclusive power to make and enforce its own internal disciplinary rules. *See* U.S. Const. Art. I, § 5, cl. 2. The D.C. Circuit's evasion of *Bartnicki* thus makes this not only an important First Amendment case, but also an important separation of powers case.

In particular, by concluding that Rep. McDermott violated a nondisclosure duty under the House Ethics Committee Rules, and attaching adverse collateral consequences to that conclusion, the D.C. Circuit violated the fundamental separation of powers that underlies our entire constitutional structure. It has long been established that Congress' power to make and enforce its own rules is "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892); *see also* 2 Joseph Story, *Commentaries on the Constitution of the United States* 298 (L. Levy ed., DaCapo Press 1970) (1833) ("If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order."). The courts are not in the business of enforcing internal House rules, either directly or indirectly, or attaching adverse collateral consequences to internal legislative activity.

To the contrary, such judicial intrusion into the legislative sphere violates the separation of powers. *See, e.g., United States v. Eilberg*, 507 F. Supp. 267, 276 (E.D. Pa. 1980) (noting the Government's concession that "[e]nforcement of a purely internal House Rule by the executive and courts would be an encroachment on the powers of the House, a violation of the separation of powers, and a violation of the [Rulemaking] clause.") (internal quotation omitted). Congress should be free to discipline, or not to discipline, its own Members without concern that its resolution of internal disciplinary matters might trigger adverse collateral consequences from a potentially (or actually) hostile judiciary. *See, e.g., United States v. Johnson*, 383 U.S. 169, 180-81 (1966); *United States v. Helstoski*, 635 F.2d 200, 204-05 (3d Cir. 1980); *see also* App. 29a (Sentelle, J., dissenting) ("We must leave for the coordinate branch of government the interpretation of its own rules.").

That is not to say that courts may not enforce generally applicable laws governing particular *conduct* that also may be at issue in an internal legislative disciplinary proceeding. Certainly, the fact that Congress has chosen to investigate one of its own does not immunize the target of that investigation from generally applicable laws. *See, e.g., United States v. Rose*, 28 F.3d 181, 186-90 (D.C. Cir. 1994). But that is not what has happened in this case. Here, the D.C. Circuit expressly concluded that Rep. McDermott could not constitutionally be punished under § 2511(1)(c), *see* App. 17-24a; 14a (Griffith, J., concurring), *but for* the court's interpretation of an internal House rule, *see* App. 7-13a; 14a (Griffith, J., concurring).

For the courts to purport to interpret Congress' internal disciplinary rules, and to attach adverse collateral legal consequences to perceived violations of those rules, undermines not only legislative authority but also judicial independence. Lawsuits between legislators, like this one, "pose a real danger of misuse of the courts

by members of Congress whose actual dispute is with their fellow legislators." *Moore v. United States House of Reps.*, 733 F.2d 946, 956 (D.C. Cir. 1984). Rival factions in Congress may have sharply divergent views with respect to the scope, application, or validity of an internal rule. For the courts to become embroiled in such disputes, and hand victory to one faction over another, would represent "a perversion of the judicial process into a political process." *Davids v. Akers*, 549 F.2d 120, 124 (9th Cir. 1977); *see also Gregg v. Barrett*, 771 F.2d 539, 549 (D.C. Cir. 1985) ("[O]ur deference and esteem for the institution [of Congress] as a whole and for the constitutional command that the institution be allowed to manage its own affairs precludes us from even attempting a diagnosis of the problem."); *Moore*, 733 F.2d at 958 (Scalia, J., concurring) (courts may not "set[] [them]selves up as arbiters of [an] internal dispute" in the House); *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (*per curiam*) ("To resolve this issue would require us not only to construe the rules of the House of Representatives but additionally to impose upon the House our interpretation of its rules.").

Indeed, it is hard to imagine a more compelling example of this point than this case. Here, a Member of Congress filed a complaint with the House Ethics Committee charging Rep. McDermott with having violated a number of duties, including his nondisclosure duties to the House Ethics Committee, by disclosing the Martins' tape. The Ethics Committee, however, specifically declined even to *charge* Rep. McDermott with violating any law, rule, regulation, or other standard of conduct. Instead, the Committee issued a Report ending the matter without imposing any sanction whatsoever (or even proceeding to an adjudicatory phase), but including some language disapproving of Rep. McDermott's conduct. *See* App. 142a (concluding that "Representative McDermott's conduct ... was inconsistent with the *spirit* of the applicable rules and represented a failure on his

part to meet his *obligations as Ranking Minority Member* of the House Select Committee on Ethics") (emphasis added).

The marked contrast between the careful language of the Ethics Committee Report and the *en banc* majority's characterization of that Report, *see* App. 12-13a, only highlights the dangers inherent in judicial efforts to interpret and apply internal legislative rules. The Committee's reference to the "spirit" of the Rules would be inexplicable if the Committee had concluded that Rep. McDermott violated the *letter* of the Rules, and the reference to his "obligations as Ranking Minority Member" cannot possibly refer to Rule 9, since that Rule's nondisclosure duty applied to all Committee Members, not just the Ranking Minority Member. If the Committee meant to find that Rep. McDermott violated his nondisclosure duty under Rule 9, in short, it hardly could have chosen a more opaque way of saying so—and indeed could not have done so under its own procedures without referring the matter to an Adjudicatory Subcommittee (and allowing Rep. McDermott to defend himself). Rather than an adjudication of a Rule violation, the Report thus reflects a classic political compromise by allowing all sides to claim some, but not complete, vindication.[2]

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[2] The Ethics Committee's conspicuous refusal to conclude that Rep. McDermott violated the nondisclosure duty in Rule 9 is not surprising. At the time relevant here, that Rule provided that "Committee members and staff shall not disclose [1] any *evidence* relating to an investigation [2] to any person or organization *outside* the Committee unless authorized by the Committee." Rule 9, Rules of the Committee on Standards of Official Conduct, U.S. House of Representatives, 104th Congress (1995-96) (emphasis added). As Judge Sentelle explained, it is—to say the least—far from clear that Rep. McDermott violated the Rule for two reasons. *First*, the tape at issue here was not "evidence" in the Gingrich investigation; rather, the tape contained a conversation that took place *after*

The D.C. Circuit *en banc* majority, however, seized upon the Report as the predicate for its conclusion that Rep. McDermott violated the nondisclosure duty in Rule 9, which in turn served as the predicate for the court's conclusion that § 2511(1)(c) could constitutionally be applied here notwithstanding *Bartnicki*. *See* App. 12-13a; *see also id.* at 14a (Griffith, J., concurring). For all intents and purposes, the *en banc* majority not only implied a private right of action to enforce the House Ethics Committee rules, but also held that the Report clearly says what it carefully refrained from saying. *See* App. 13a ("We agree with and accept the Ethics Committee's interpretation of the Rules as applied to this case."). By barreling past the point where the Ethics Committee itself refused to go, however, the *en banc* majority effectively overturned the Committee's careful political

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the investigation to discuss a political *response* to the investigation. *See* App. 29a (Sentelle, J., dissenting). *Second*, the Rule's prohibition on the disclosure of information "outside" the Committee presupposes that the information was received from "inside" the Committee in the first place. Here, Rep. McDermott did not disclose *internal* Committee information; he simply disclosed a tape recording of a conversation among persons outside the Committee received unsolicited from other persons outside the Committee. *See id.* The courts simply have no business resolving such ambiguities in internal legislative rules—especially where, as here, Congress itself has declined to resolve them. *See, e.g., United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995) ("[J]udicial interpretation of an ambiguous House Rule runs the risk of the court intruding into the sphere of influence reserved to the legislative branch under the Constitution."); *id.* at 1312 ("[T]he Judiciary [may not] resolve against a Member of Congress an ambiguity in the Rules by which the Legislature governs itself, if reason allows otherwise."); *id.* ("If there can be a reasonable doubt about whether ... a Member ... violat[ed] ... a House Rule, then the court cannot presume to interpret the rule.").

compromise—not only awarding victory where the Committee itself declined to do so, but compromising its own independence by appearing to choose sides in an internal Legislative dispute.

These are precisely the dangers that led the Framers to include the Rulemaking Clause in the Constitution. It is hard to overstate the D.C. Circuit majority's affront to the separation of powers. If an obvious political compromise like the one reflected in the Ethics Committee Report at issue here may nonetheless trigger adverse collateral consequences beyond the legislative sphere, such compromise will become impossible. Unless this Court grants review, Rep. Boehner and his political allies will have garnered in court the very victory that eluded them in the Ethics Committee. This Court should not allow the lower federal courts thus to become pawns of different political factions in Congress. If ever a case warranted definitive resolution at long last by the Supreme Court of the United States, it is this one.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

FRANK CICERO, JR., P.C.
KIRKLAND & ELLIS LLP
200 East Randolph Dr.
Chicago, IL 60601

CHRISTOPHER LANDAU, P.C.
Counsel of Record
EDWIN JOHN U
PADRAIC B. FENNELLY
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

September 28, 2007

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 31, 2006
& January 25, 2007

Decided May 1, 2007

No. 04-7203

JOHN A. BOEHNER,

APPELLEE

V.

JAMES A. MCDERMOTT,

APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 98cv00594)

Christopher Landau argued the causes for appellant. With him on the briefs was *Frank Cicero Jr.*

Theodore J. Boutrous Jr. and *Thomas H. Dupree Jr.* were on the brief for *amici curiae* Dow Jones & Company, et al. in support of appellant urging reversal.

Michael A. Carvin argued the causes for appellee. With him on the briefs was *Louis K. Fisher.*

Before: GINSBURG *Chief Judge*, and SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND, BROWN and GRIFFITH, *Circuit Judges*.*

Opinion for the Court filed by *Circuit Judge* RANDLOPH.

Concurring opinion filed by *Circuit Judge* GRIFFITH.

Dissenting opinion filed by *Circuit Judge* SENTELLE, in which *Circuit Judges* ROGERS, TATEL and GARLAND join and *Circuit Judge* GRIFFITH joins as to Part I.

RANDOLPH, *Circuit Judge*: Both parties to this case are members of the United States House of Representatives. John A. Boehner, the plaintiff, represents Ohio's Eighth District. James A. McDermott, the defendant, represents Washington's Seventh District. The complaint alleged that Representative McDermott violated 18 U.S.C. § 2511(1)(c) when he disclosed a tape recording of an illegally intercepted conversation in which Representative Boehner participated.

In our initial decision in this case, we held that Representative McDermott did not have a First Amendment right to disclose the tape. *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999). The Supreme Court vacated our decision and returned the case to us for further consideration in light of *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *See* 532 U.S. 1050 (2001). We remanded the case to the district court. After the parties engaged in discovery, the district court granted summary judgment in favor of Representative Boehner, awarding him $10,000 in statutory damages, *see* 18 U.S.C. § 2520(c)(2), $50,000 in punitive damages, and reasonable attorney's fees and costs. A panel of this court, with one judge dissenting, affirmed on the ground that Representative McDermott had not lawfully obtained the tape recording.

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* Circuit Judge Kavanaugh did not participate in this matter.

Boehner v. McDermott, 441 F.3d 1010 (D.C. Cir. 2006). We vacated that decision and ordered the case reheard en banc. *Boehner v. McDermott*, No. 04-7203 (D.C. Cir. June 23, 2006) (order granting rehearing en banc).

I.

On remand, the record developed in discovery showed the following.

On December 21, 1996, Representative Boehner participated in a conference call with members of the Republican Party leadership, including then-Speaker of the House Newt Gingrich. At the time of the conversation Gingrich was the subject of an investigation by the House Committee on Standards of Official Conduct, commonly known as the House Ethics Committee. Representative Boehner was chairman of the House Republican Conference. The participants discussed how they might deal with an expected Ethics Committee announcement of Gingrich's agreement to accept a reprimand and to pay a fine in exchange for the Committee's promise not to hold a hearing.

Representative Boehner was in Florida when he joined the conference call. He spoke from a cellular telephone in his car. John and Alice Martin, who lived in Florida, used a police radio scanner to eavesdrop on the conversation, in violation of 18 U.S.C. § 2511(1)(a). They recorded the call and delivered the tape in a sealed envelope to the Florida office of then-Representative Karen Thurman. Staff members forwarded the envelope to Thurman's Washington office. On January 8, 1997, Thurman's chief of staff learned that the Martins would be visiting the Washington office. Both Thurman and her chief of staff sought legal advice about accepting the tape, presumably because they knew of its contents and how it had been recorded. At some point they consulted then-Representative David Bonior's chief of staff and legislative director. Stan Brand, former General Counsel to the House of Representatives, advised that the tape should not be accepted under any circumstances and that

it should be turned over to the Ethics Committee or other appropriate authorities. When the Martins arrived at Thurman's office, her chief of staff returned the tape in its unopened envelope and suggested they turn it over to the Ethics Committee.

At about 5 p.m. on January 8, 1997, in a small anteroom adjacent to the Ethics Committee hearing room, the Martins delivered the tape to Representative McDermott in a sealed 8-1/2" by 11" envelope. At the time, Representative McDermott was the ranking Democrat on the Ethics Committee. With the envelope the Martins also delivered a business card and a typed letter dated January 8, 1997, and addressed to "Committee On Standards of Official Conduct . . . Jim McDermott, Ranking Member." The letter read:

Enclosed in the envelope you will find a tape of a conversation heard December 21, 1996 at about 9:45 a.m. The call was a conference call heard over a scanner. We felt the information included were [sic] of importance to the committee. We live in the 5th. Congressional District and attempted to give the tape to Congresswoman Karen Thurman. We were advised by her to turn the tape directly over to you. We also understand that we will be granted immunity.

My husband and I work for Columbia County Schools in Columbia County Florida. We pray that committee will consider our sincerity in placing it in your hands.

We will return to our home today.

Thank you for your consideration.

John and Alice Martin

After conversing with the Martins, Representative McDermott accepted the envelope and returned to the Ethics Committee hearing room.

Later that evening, during a recess, Representative McDermott left the Ethics Committee hearing room and went to his office. There he opened the Martins'

envelope, emptied the contents, and listened to the tape. Still later, he called two reporters: Jeanne Cummings of The Atlanta Journal-Constitution, for whom he left a message, and Adam Clymer of *The New York Times*, whom he reached. Clymer went to Representative McDermott's office, listened to the tape, and made a recording of it. Cummings returned Representative McDermott's call the next day and came to his office and listened to the tape.

The contents of the tape had substantial news value. In particular, the tape revealed information bearing on whether Gingrich had violated his settlement agreement with the Ethics Committee. On January 10, 1997, *The New York Times* published a front-page article by Clymer entitled "Gingrich Is Heard Urging Tactics in Ethics Case." The article, which included lengthy excerpts of the recorded conversation, reported the circumstances leading to the disclosure of the tape:

> The call was taped by people in Florida who were unsympathetic to Mr. Gingrich and who said they heard it on a police scanner that happened to pick up the cellular telephone transmissions of one of the participants. It was given to a Democratic Congressman, who made the tape available to The New York Times. . .
>
> Mr. Gingrich, Mr. Bethune and the others discussed their tactics in a conference telephone call, a transcript of which was made available by a Democratic Congressman hostile to Mr. Gingrich who insisted that he not be identified further.
>
> The Congressman said the tape had been given to him on Wednesday by a couple who said they were from northern Florida. He quoted them as saying it had been recorded off a radio scanner, suggesting that one participant was using a cellular telephone. They said it was recorded about 9:45 A.M. on Dec. 21.

Adam Clymer, *Gingrich Is Heard Urging Tactics in Ethics Case*, N.Y. TIMES, Jan. 10, 1997, at A1, A20. *The Atlanta Journal-Constitution* ran a similar story the following day. *See* Jeanne Cummings, *Gingrich Ethics Case: Panel Trusted His Motives, Gingrich Told GOP Allies*, ATLANTA J.-CONST., Jan. 11, 1997, at 6A.

On January 13, 1997, the Martins held a press conference and identified Representative McDermott as the congressman to whom they had delivered the tape. Representative McDermott then sent copies of the tape to the offices of the Ethics Committee and resigned from the Committee. The Committee Chairman, then-Representative Nancy Johnson, forwarded the tape to the Department of Justice. The government prosecuted the Martins for violating 18 U.S.C. § 2511(1)(a), which forbids unauthorized interception of "wire, oral, or electronic communication." The Martins pled guilty and were fined $ 500.

On cross motions for summary judgment, the district court held that Representative McDermott violated 18 U.S.C. § 2511(1)(c) when he disclosed the tape to the reporters. *Boehner v. McDermott*, 332 F. Supp. 2d 149, 158 (D.D.C. 2004). Section 2511(1)(c) makes intentional disclosure of any illegally intercepted conversation a criminal offense if the person disclosing the communication knew or had "reason to know" that it was so acquired. The district court viewed the crucial issue to be whether Representative McDermott lawfully obtained the tape from the Martins. *See id.* at 163-64. The court held there was no genuine issue of material fact that the Martins' letter to Representative McDermott had been outside of the envelope containing the tape and that Representative McDermott must have read it. *Id.* at 166-67, 169. This established that Representative McDermott, when he accepted the tape, knew the Martins had illegally intercepted the conversation and illegally disclosed it to him. It followed that he did not lawfully obtain the tape. *Id.* at 165-66, 169. On appeal, a divided panel of this court agreed that Representative

McDermott obtained the tape unlawfully, but for reasons other than those the district court gave. 441 F.3d at 1016-17.

II.

This is an as-applied challenge to 18 U.S.C. § 2511(1)(c). The question therefore is whether Representative McDermott had a First Amendment right to disclose to the media this particular tape at this particular time given the circumstances of his receipt of the tape, the ongoing proceedings before the Ethics Committee, and his position as a member of the Committee. In answering this question we shall assume arguendo that Representative McDermott lawfully obtained the tape from the Martins.[1]

Whatever the *Bartnicki* majority meant by "lawfully obtain," *see* 532 U.S. at 538 (Breyer, J., joined by O'Connor, J., concurring), the decision does not stand for the proposition that anyone who has lawfully obtained truthful information of public importance has a First Amendment right to disclose that information. *Bartnicki* avoided laying down such a broad rule of law, *see* 532 U.S. at 528-29, and for good reason. *See* Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1126-32 (2002). There are many federal provisions that forbid individuals from disclosing information they have lawfully obtained. The validity of these provisions has long been assumed. Grand jurors, court reporters, and prosecutors, for instance, may "not disclose a matter occurring before the grand jury." FED. R. CRIM. P. 6(e)(2)(B). The Privacy Act imposes criminal penalties on government employees who disclose agency

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[1] Chief Judge Ginsburg and Judges Henderson, Randolph, and Brown believe that, for the reasons given in the second panel opinion in this case, Representative McDermott did not lawfully obtain the tape. *See* 441 F.3d at 1016.

records containing information about identifiable individuals to unauthorized persons. *See* 5 U.S.C. § 552a(i)(1). The Espionage Act punishes officials who willfully disclose sensitive national defense information to persons not entitled to receive it. *See* 18 U.S.C. § 793(d). The Intelligence Identities Protection Act prohibits the disclosure of a covert intelligence agent's identity. *See* 50 U.S.C. § 421. Employees of the Internal Revenue Service, among others, may not disclose tax return information. *See* 26 U.S.C. § 6103(a). State motor vehicle department employees may not make public information about an individual's driver's license or registration. *See* 18 U.S.C. § 2721. Employees of the Social Security Administration, as well as other government employees, may not reveal social security numbers or records. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I), (III).[2] Judicial employees may not reveal confidential information received in the course of their official duties. *See* CODE OF CONDUCT FOR JUDICIAL EMPLOYEES Canon 3D. And so forth.

In analogous contexts the Supreme Court has sustained restrictions on disclosure of information even though the information was lawfully obtained. The First Amendment did not shield a television station from liability under the common law right of publicity when it filmed a plaintiff's "human cannonball" act and broadcast the film without his permission. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575-79 (1977). When a newspaper divulged the identity of an individual who provided information to it under a promise of

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[2] The government can also limit disclosures by persons who are not its employees without running afoul of the First Amendment. Private attorneys who reveal their clients' confidences may be punished for doing so. And those who sell or rent video tapes or DVDs ordinarily may not reveal "personally identifiable information concerning" their customers. *See* 18 U.S.C. § 2710(b).

confidentiality, the First Amendment did not provide the paper with a defense to a breach of contract claim. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991). The First Amendment did not prevent the government from enforcing reasonable confidentiality restrictions on former employees of the CIA. *See Snepp v. United States*, 444 U.S. 507, 509-10 (1980). Parties to civil litigation did not "have a First Amendment right to disseminate, in advance of trial, information gained through the pretrial discovery process." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 22, 37 (1984).

In *United States v. Aguilar*, 515 U.S. 593 (1995), a case closely analogous to this one, the Supreme Court held that the First Amendment did not give a federal judge, who obtained information about an investigative wiretap from another judge, the right to disclose that information to the subject of the wiretap.[3] The judge challenged his conviction for violating 18 U.S.C. § 2232(c), which prohibits the improper disclosure of an investigative wiretap. In rejecting his First Amendment claim, the Court wrote that the judge was not "simply a member of the general public who happened to lawfully acquire possession of information about the wiretap; he was a Federal District Court Judge who learned of a confidential wiretap application from the judge who had authorized the interception, and who wished to preserve the integrity of the court. Government officials in sensitive confidential positions may have special duties of nondisclosure."[4] *Id.* at 605-06.

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[3] The equivalent provision is currently codified at § 2232(d).

[4] *See* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 5C(8): "Information acquired by a judge in the judge's judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to the judge's judicial duties."

Aguilar stands for the principle that those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information. The question thus becomes whether, in the words of *Aguilar*, Representative McDermott's position on the Ethics Committee imposed a "special" duty on him not to disclose this tape in these circumstances. *Bartnicki* has little to say about that issue. The individuals who disclosed the tape in that case were private citizens who did not occupy positions of trust.

All members of the Ethics Committee, including Representative McDermott, were subject to Committee Rule 9, which stated that "Committee members and staff shall not disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee."[5] This rule recognizes the unique role of the Ethics Committee and reflects a desire "to protect the rights of individuals accused of misconduct, preserve the integrity of the investigative process, and cultivate collegiality among Committee members," STAFF OF H. ETHICS REFORM TASK FORCE, 105TH CONG., REPORT OF THE ETHICS REFORM TASK FORCE ON H. RES. 168, at 10-11 (Comm. Print 1997). All members of the House of Representatives were also subject to Rule 23 of the House Rules, which stated that "[a] Member . . . shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof."

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[5] Under House Rule 10, clause 4(e)(3) of the 105th Congress, the special proceedings dealing with Gingrich proceeded under the rules applicable to the 104th Congress. Thus, although Representative McDermott disclosed the tape during the 105th Congress, the applicable rule was that of the 104th Congress.

The House has the power to make and enforce such rules under the Rulemaking Clause of the Constitution, which states that "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member," U.S. CONST. art. I, § 5, cl. 2. There is no question that the rules themselves are reasonable and raise no First Amendment concerns. Counsel for Representative McDermott conceded that the House could, consistent with the First Amendment, punish Representative McDermott if it determined he had violated its rules by releasing the Martins' tape to the media.

If the First Amendment does not protect Representative McDermott from House disciplinary proceedings, it is hard to see why it should protect him from liability in this civil suit. Either he had a First Amendment right to disclose the tape to the media or he did not. If he had the right, neither the House nor the courts could impose sanctions on him for exercising it. If he did not have the right, he has no shield from civil liability or from discipline imposed by the House. In that event, his civil liability would rest not on his breach of some ethical duty, but on his violation of a federal statute for which he had no First Amendment defense. The situation is the same as that in *Aguilar*. There the defendant-judge was punished not for violating his ethical duty to maintain judicial secrecy, but for violating the general prohibition on disclosing investigative searches.[6]

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[6] The code of conduct applicable to federal judges is not judicially enforceable; its commentary states that "the Code is not designed or intended as a basis for civil liability or criminal prosecution." CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 1 cmt. Nevertheless, the Supreme Court in *Aguilar* essentially took notice of the applicable standard of conduct in deciding that the defendant-judge had no First Amendment

The only remaining question is whether the tape fell within Representative McDermott's duty of confidentiality under the rules of the House and the Ethics Committee. Representative McDermott claims the tape did not fall within his duty of confidentiality because, rather than "internal Committee information," it was a "recording of a conversation among persons outside the Committee received unsolicited from other persons outside the Committee." Citing *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), he contends the rules are too ambiguous for the court to apply in this case. In *Rostenkowski*, we noted that "the Rulemaking Clause of Article I clearly reserves to each House of the Congress the authority to make its own rules." *Id.* at 1306. When "a court cannot be confident that its interpretation is correct, there is too great a chance that it will interpret the Rule differently than would the [House] itself." *Id.* Thus, "a sufficiently ambiguous House Rule is nonjusticiable." *Id.*

Here we can be confident that the rules covered Representative McDermott's handling of the tape. On December 8, 2006, the Ethics Committee adopted the report of the investigative subcommittee dealing with Representative McDermott's disclosure of the tape. The report emphasized "the unique charter of the Committee to conduct its work in a nonpartisan manner, and the threat posed to the integrity of the House of even the appearance of unfairness to Members under investigation or of bias or impartiality by Members of the Committee." *In re Representative James McDermott,* H.R. REP. NO. 109-732, at 17 (2006). After discussing Committee Rule 9 and House Rule 23, among other rules, the report concluded "Representative McDermott's conduct, *i.e.*, his disclosure to the news media of the contents of the tape furnished to him by the Martins, was inconsistent with

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defense to criminal liability for disclosing a wiretap. *See* 515 U.S. at 605-06.

the spirit of the applicable rules and represented a failure on his part to meet his obligations as Ranking Minority Member of the House Select Committee on Ethics." *Id.* at 16. The report said Representative McDermott should have "entrust[ed] the Committee at the outset with the information to which he alone on the Committee had access." *Id.* at 17.

We agree with and accept the Ethics Committee's interpretation of the rules as applied to this case, and thereby eliminate the concerns mentioned in *Rostenkowski*.[7] When Representative McDermott became a member of the Ethics Committee, he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the Martins' illegal recording. He therefore had no First Amendment right to disclose the tape to the media.

Affirmed.

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[7] Representative McDermott makes much of the fact that the investigative subcommittee did not adopt a Statement of Alleged Violation under Committee Rule 19(f) of the Ethics Committee, but rather issued a report under Committee Rule 19(g) without recommending further disciplinary proceedings. We cannot see why this matters. The subcommittee reached conclusions adverse to Representative McDermott, finding that his disclosure of the tape not only violated the spirit of the rules but also violated "his obligations as Ranking Minority Member." *In re Representative James McDermott*, H.R. REP. No. 109-732, at 16 (2006). The Committee ratified the subcommittee's findings, adopting the report "as the Report of the full Committee." *See* COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT, SUMMARY OF ACTIVITIES, H.R. REP. NO. 109-744, pt. VII (2007). The Committee necessarily believed that it had authority to act as it did, and "the rules of a particular committee are for that committee to interpret." LEWIS DESCHLER & WILLIAM HOLMES BROWN, PROCEDURE IN THE U.S. HOUSE OF REPRESENTATIVES, 97TH CONGRESS, ch. 17 § 11.1 (4th ed. 1982).

GRIFFITH, *Circuit Judge*, concurring: Although I agree that Representative McDermott's actions were not protected by the First Amendment and for that reason join Judge Randolph's opinion, I write separately to explain that I would have found the disclosure of the tape recording protected by the First Amendment under *Bartnicki v. Vopper*, 532 U.S. 514 (2001), had it not also been a violation of House Ethics Committee Rule 9, which imposed on Representative McDermott a duty not to "disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee." Although the Court does not and need not reach the *Bartnicki* issue to resolve the matter before us, two previous panels in this case have held that the congressman's actions were not protected by the First Amendment. I believe it is worth noting that a majority of the members of the Court—those who join Part I of Judge Sentelle's dissent—would have found his actions protected by the First Amendment. Nonetheless, because Representative McDermott cannot here wield the First Amendment shield that he voluntarily relinquished as a member of the Ethics Committee, I join Judge Randolph's opinion in concluding that his disclosure of the tape recording was not protected by the First Amendment.

SENTELLE, *Circuit Judge, dissenting,* with whom *Circuit Judges* ROGERS, TATEL, and GARLAND join, and with whom Circuit Judge GRIFFITH joins as to Part I: The history of this case is by now quite long, and most of it is set out either in the majority opinion or in one of the previous iterations of the underlying events and the court decisions set forth in prior opinions of this court. *See Boehner v. McDermott,* 191 F.3d 463 (D.C. Cir. 1999) ("*Boehner D.C. Cir. I*"); *Boehner v. McDermott,* 441 F.3d 1010 (D.C. Cir. 2006) ("*Boehner D.C. Cir. II*"). Appellee brought the present action, which the district court dismissed, reasoning this application of 18 U.S.C. § 2511(1)(c) violated the First Amendment guarantee to the right of free speech. The defendant appealed. In a split decision, a panel of this court reversed the dismissal, holding that the application of section 2511(1)(c) and a parallel Florida statute "are not unconstitutional as applied in this case." *Boehner D.C. Cir. I,* 191 F.3d at 478; *see also id.* at 480 (Ginsburg, J., concurring). I disagreed with the majority's opinion then, as I do today. As I perceived the case then, and as we perceive it now, the issue is: "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?" *Id.* at 484-85 (Sentelle, J., dissenting) (quoted in *Bartnicki v. Vopper,* 532 U.S. 514, 528 (2001)). We would have answered that question in the negative. Today I reach that conclusion with confidence, based on the Supreme Court's decision adjudicating the constitutionality of a similar application of this same analysis in *Bartnicki.*

At approximately the same time that our prior decision was making its way to the Supreme Court, the Court granted *certiorari* in *Bartnicki v. Vopper,* 200 F.3d 109 (3d Cir. 1999), to answer precisely the issue before us in *Boehner. See Bartnicki v. Vopper,* 530 U.S. 1260 (2000) (granting *certiorari*). In *Bartnicki,* the Third Circuit had

concluded that the application of 18 U.S.C. § 2511(1)(c) to prevent disclosure of information obtained by the disclosing person from a tape of unlawfully intercepted communications was constitutionally "invalid" because it "deterred significantly more speech than necessary to protect the privacy interests at stake." 532 U.S. at 522. The Supreme Court expressly granted *certiorari* "to resolve the conflict," between *Bartnicki* and our decision in *Boehner D.C. Cir. I. Id.* The Court affirmed the decision of the Third Circuit, *id.* at 535, and thereby resolved the conflict in favor of the Third Circuit's decision, not our decision in *Boehner.*

Thereafter, in the wake of *Bartnicki*, the Supreme Court vacated our prior decision in *Boehner D.C. Cir. I* and remanded to this court for further consideration in light of *Bartnicki.* 532 U.S. 1050 (2001). We remanded the matter to the district court. That court entered a new decision in favor of appellee. *Boehner v. McDermott*, 332 F. Supp. 2d 149 (D.D.C. 2004). McDermott then appealed. A panel of this court reheard the matter and affirmed the district court, again over my dissent. *Boehner D.C. Cir. II*, 441 F.3d 1010. We vacated the panel and set the matter for the present en banc proceeding. On the issue considered by the Supreme Court in *Bartnicki*, the position of the dissent in the prior panel opinions now commands a majority of the court so that Section I of this opinion speaks for the court. However, because of the majority decision as to the *Bartnicki* issue, the court found it necessary to reach a second issue not previously fully considered. As that issue became the rule of decision, and resulted in an affirmance of the district court, and as a majority of the court has now decided to affirm the district court on the basis of the second issue, discussed in Section II of this separate opinion, that portion of this opinion will speak only for a dissenting minority of the court.

I.

As to the issue dealt with in the prior opinions, speaking now for a majority of the court, we determine that *Bartnicki* is controlling and that the *Bartnicki* reasoning of the Supreme Court compels a conclusion that the district court incorrectly concluded that *Bartnicki* does not apply.

In *Bartnicki*, the chief negotiator for a Union Local, which was then engaged in negotiations on behalf of teachers with a local school board, used a cellular phone to call the president of the Union "and engage in a lengthy conversation about the status of the negotiations." 532 U.S. at 518. At one point in the conversation, referring to the school board's "intransigence," she said "'we're gonna have to go to their . . . homes . . . [t]o blow off their front porches . . . .'" *Id.* at 518-19. A local radio commentator, respondent in the Supreme Court, broadcast a tape of the conversation on a radio show. All parties agreed that the tape, like the tape of Boehner's conversation released by McDermott, was the result of an unlawful interception. The identity of the interceptor remained undisclosed throughout the litigation. The Union officers, like Boehner in the instant case, sued the publishers of the contents of the tape. The defendants included the broadcaster, the radio stations over which he made his broadcast, and the person who furnished the broadcaster with the tape, himself the head of a local citizens' group who testified that he had obtained the tape when it was left anonymously in his mailbox. Like Boehner in the case before us, plaintiffs relied on section 2511(1)(c) and a state statute of similar import. The district court granted summary judgment for the plaintiffs, rejecting the defendants' First Amendment defense. As noted above, the Third Circuit, in a divided opinion, disagreed, reversed the trial court, and remanded with directions to the district court to grant the summary judgment motions of the defendants on the basis of the First Amendment defense. *Bartnicki*, 200 F.3d at 129.

On *certiorari* the Supreme Court, as had the Third Circuit, ruled that the statute was content neutral and subjected the statute to review under the "intermediate scrutiny" standard. 532 U.S. at 521, 526. Applying that standard, the Supreme Court held that the statute was unconstitutional as applied.

In addressing the issue, the Supreme Court adopted my formulation:

> Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?

Id. at 528 (quoting *Boehner D.C. Cir. I,* 191 F.3d at 484-85) (internal quotation marks omitted) (Sentelle, J., dissenting). In analyzing the law on that subject, the Supreme Court first noted that "[a]s a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Id.* at 527 (quoting *Smith v. Daily Mail Publ'g Co.,* 443 U.S. 97, 102 (1979)). The Supreme Court then expressed its continuing belief "that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.* at 529 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989)) (alteration in original). In applying that balance to the facts before it, the Court observed that the United States, appearing in the case to defend the constitutionality of the statute, had identified "two interests served by the statute." *Id.* The first of those interests was the removal of "an incentive for parties to intercept private conversations," and the second, to "minimiz[e] the harm to persons whose conversations have been illegally intercepted." *Id.* While the Court was willing to "assume that those interests adequately justify

the prohibition in § 2511(1)(d) against the interceptor's own use of information . . . acquired by violating § 2511(1)(a)," the Court explicitly stated that "it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends." *Id.*

The Court easily dispensed with the first justification, opining that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." *Id.* The Court concluded, however, that "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Id.* at 529-30. It further noted that "there is no basis for assuming that imposing sanctions" on the communicating possessor of conversations illegally taped by another "will deter the unidentified scanner from continuing to engage in surreptitious interceptions." *Id.* at 531. Thus, the Court held that "the Government's first suggested justification for applying § 2511(1)(c) to an otherwise innocent disclosure of public information is plainly insufficient." *Id.* at 532.

However, the Court found the government's second justification, that is, the protection of privacy, "considerably stronger." *Id.* It noted the importance of privacy of communication and the legitimacy of the argument that "fear of public disclosure of private conversations might well have a chilling effect on private speech." *Id.* at 533. Nonetheless, the Court was convinced that the enforcement of section 2511(1)(c) on the facts before it, "implicat[ed] the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern." *Id.* at 533-34. In concluding that this second interest did not have sufficient strength to warrant the limitation on publication of truthful information of public concern, the Court reiterated the classic principle that "'[t]he right of privacy does not prohibit any publication of matter which

is of public or general interest.'" *Id.* at 534 (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890)).

In the light of the Supreme Court's resolution of the conflict between our *Boehner* decision and the Third Circuit's decision in *Bartnicki*, there is no justification for us to hold otherwise on the facts before us. There is no distinction of legal, let alone constitutional, significance between our facts and those before the Court in *Bartnicki*. As the panel majority in *Boehner D.C. Cir. II* admitted, "[t]he *Bartnicki* Court held that under the First Amendment, § 2511(1)(c) was invalid as applied to individuals who lawfully obtained a tape of such a conversation and then disclosed it." 441 F.3d at 1013. That said, appellee is unable to produce a material distinction between this case and *Bartnicki*. Granted, the panel majority stated:

> The difference between this case and *Bartnicki* is plain to see. It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is guilty of receiving stolen property, even if the ring was intended only as a gift.

Id. at 1017 (footnote omitted). In fact, the difference is not plain at all. In *Bartnicki* the Supreme Court expressly stated:

> The suit at hand involves the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know—or at least had reason to know—that the interception was unlawful.

532 U.S. at 517-18. The panel majority apparently made a distinction between the two cases based on an analogy

between a person who buys a diamond ring from a thief, and one who obtains a stolen diamond ring knowing it to be stolen or having at least good reason to know that it was stolen. We see no such distinction, let alone a plain one of constitutional significance. The Supreme Court underlined the lack of constitutional significance of the communicator's knowledge that the interception had been unlawfully conducted. It stated that "[w]e accept petitioners' submission that the interception was intentional, and therefore unlawful, and that, at a minimum, respondents 'had reason to know' that it was unlawful." *Id.* at 525. The panel majority, apparently attempting to shore up its distinction, stated:

> As Chief Judge Ginsburg wrote in the original appeal: "One who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not 'lawfully obtain[ed]' that information in any meaningful sense."

Boehner D.C. Cir. II, 441 F.3d at 1017 n.6 (quoting *Boehner D.C. Cir. I*, 191 F.3d at 479 (Ginsburg, J., concurring)) (alteration in original).

The Supreme Court has directly dispelled that notion both in *Bartnicki* itself and previously. The Court in *Bartnicki* expressly stated, "[respondents'] access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else." 532 U.S. at 525. In support of this proposition the court cited and quoted *Florida Star*, which stated "[e]ven assuming the Constitution permitted a State to proscribe receipt of information, Florida has not taken this step." 491 U.S. at 536 (emphasis in original). Florida still has not taken that step, nor has Congress. Therefore, the otherwise-lawful receipt of unlawfully obtained information remains in itself lawful, even where the receiver knows or has reason to know that the source has obtained the information unlawfully.

Even less convincing is the *Boehner D.C. Cir. II* panel majority's assertion that the Court mentioned the anonymity of the interceptor in *Bartnicki* several times and "distinguished this case on that ground." 441 F.3d at 1015. The asserted distinguishing of this case occurred in a footnote stating as follows:

> In the *Boehner* case, as in this suit, a conversation over a car cell phone was intercepted, but in that case the defendant knew both who was responsible for intercepting the conversation and how they had done it. In the opinion of the majority [of the D.C. Circuit], the defendant acted unlawfully in accepting the tape in order to provide it to the media.

532 U.S. at 522 n.5 (quoted at 441 F.3d at 1014) (internal citations omitted). The panel majority hastened to say "[w]e do not want to read too much into the Court's 'but' in the first sentence, yet one must wonder why the Court drew this distinction if it meant to adopt the rule Representative McDermott urges on us." 441 F.3d at 1014. The referenced footnote occurs in the Court's statement of the facts of the case and is never referenced in the legal analysis. Indeed, the footnote is subscribed to a textual sentence stating "[i]n so doing, [the Third Circuit dissenter] agreed with the majority opinion in a similar case decided by the Court of Appeals for the District of Columbia, *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999)." 532 U.S. at 522. If the Supreme Court in fact thought that the "distinction" was of constitutional significance, one must wonder why it thought the different results in the two circuit cases constituted a disagreement. This wonderment must be greatly enhanced upon reading the next sentence, which states, "[w]e granted certiorari to resolve the conflict." *Id.* The Supreme Court then goes on to resolve the conflict without making any further mention of any factual difference between the cases. To paraphrase the *Boehner D.C. Cir. II* panel majority, one must wonder why the Court so easily dispensed with the distinction between

one who knows who unlawfully intercepted a conversation and one who knows or has reason to know it was unlawfully intercepted. Indeed, the Supreme Court's disposition of the case lays to rest any distinction even between the one who knows and the one who has reason to know. The Court reversed and remanded, directing entry of judgment for the defense on the constitutional theory. The record before the Court did not establish whether the defendants knew or only had reason to know of the unlawful obtaining of the conversations. If there were any such distinction in the High Court's view, the disposition would have been a vacatur and remand for the lower courts to establish upon which side of the "distinction" their case fell – that is, to determine whether the respondents knew or only had reason to know. As the Court made no such disposition, there is plainly no such distinction of constitutional magnitude.

The Supreme Court has decided the first issue of this case, that is, whether the United States (or Florida) can constitutionally bar the publication of information originally obtained by unlawful interception but otherwise lawfully received by the communicator, in the negative. We venture to say that an opposite rule would be fraught with danger. Just as Representative McDermott knew that the information had been unlawfully intercepted, so did the newspapers to whom he passed the information. Representative Boehner has suggested no distinction between the constitutionality of regulating communication of the contents of the tape by McDermott or by The Washington Post or The New York Times or any other media resource. For that matter, every reader of the information in the newspapers also learned that it had been obtained by unlawful intercept. Under the rule proposed by Representative Boehner, no one in the United States could communicate on this topic of public interest because of the defect in the chain of title. We do not believe the First Amendment permits this interdiction of public information either at the stage of the newspaper-reading public, of the newspaper-

publishing communicators, or at the stage of Representative McDermott's disclosure to the news media. Lest someone draw a distinction between the First Amendment rights of the press and the First Amendment speech rights of nonprofessional communicators, we would note that one of the communicators in *Bartnicki* was himself a news commentator, and the Supreme Court placed no reliance on that fact.

Therefore, as to the first issue, we now determine that the district court decision in favor of Boehner was incorrect as to this issue.

II.

A.

Notwithstanding the majority's view that the district court was incorrect as to the *Bartnicki* issue, the en banc court now holds that the judgment in favor of Boehner will be upheld on a ground different than that relied upon by the district court, arising from an issue not addressed in the previous majority opinions of this court. Boehner's argument, accepted as the basis of the majority's holding that the district court should be affirmed, is that McDermott's speech was not entitled to the First Amendment protection recognized in *Bartnicki* and the cases upon which it relies, but not because the First Amendment provides no protection against the imposition of liability under 18 U.S.C. § 2511(1)(c) to the receiver of information unlawfully obtained by the transferor of the information. Rather, Boehner argues, the protections of the First Amendment are not available in an action under § 2511(1)(c) to a public official whose First Amendment rights are otherwise limited by a body of rules unrelated to that statute. More specifically, Boehner advances an argument, which the majority accepts, that starts from the undisputed factual proposition that McDermott, as a member of the Ethics Committee of the United States House of Representatives, was subject to Committee Rule 9. That rule stated that "Committee members and staff

shall not disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee." Boehner reasons, and the majority now agrees, that because McDermott's speech was otherwise limited in this fashion by the rules, he was not afforded the First Amendment protection recognized in *Bartnicki* against liability for disclosure under the wiretap statutes of the United States and Florida. I find this reasoning to be a *non sequitur*.

The majority relies on such cases as *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), for the proposition that the Supreme Court has sustained restrictions on disclosure of information even though the information was lawfully obtained. Maj. Op. at 9. It is true that in *Zacchini* the Supreme Court recognized the right of a performer to recover for the economic loss caused by the uncompensated broadcast of his performance under the state law tort of infringement of the performer's "right of publicity." By no means, though, did the Court in *Zacchini* hold that its conclusion that the First Amendment did not protect the broadcaster against that cause of action deprived it of First Amendment protection in all circumstances and under all theories of law related to its possible broadcast of performances. Indeed, the *Zacchini* Court expressly stated

> It is evident, and there is no claim here to the contrary, that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act.

433 U.S. at 574 (footnote omitted). As Justice Powell noted in dissent,

> The holding today is summed up in one sentence: "Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments

> do not immunize the media when they broadcast a performer's entire act without his consent."

Id. at 579 (Powell, J., dissenting) (quoting *id.* at 574-75). Indeed, the *Zacchini* Court was at pains to note that "[p]etitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it." *Id.* at 578.

In short, *Zacchini* is not analogous to the case at bar. It would perhaps be analogous were we passing on the authority of the congressional committee to enforce its rule against McDermott in the face of a First Amendment claim, but that is not our case.

Likewise, the majority's reliance on *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), is misplaced. That case holds no more than that a person with whom a newspaper has made a contract not to publish certain information may recover damages when the defendant has breached that contract. The opinion in *Cohen*, while short and narrow, nonetheless distinguishes a contract claim from, for example, an action for libel or defamation:

> Nor is Cohen attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim. . . . Cohen could not sue for defamation because the information disclosed [his name] was true.

Id. at 671 (internal citations and punctuation omitted). Thus, the Court expressly distinguished the Cohen facts from *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), wherein the Court had "held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress." *Cohen*, 501 U.S. at 671.

Again, the *Cohen* Court by no means held that the recognition of one limitation on First Amendment protection of a particular communication rendered the

First Amendment inapplicable to that communication for other purposes. Just so today. It may well be that the Committee's rule constitutes a valid limitation on McDermott's speech. For reasons set forth below, that is by no means clear to me. It is clear that even if that is the case, the rule cannot deprive the speech of all First Amendment protection.

The majority further relies on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). That case stands for nothing more than the proposition that

> where a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

Id. at 37 (footnote omitted). That holding simply has no application to the case before us.

Finally, the majority places strongest reliance on *United States v. Aguilar*, 515 U.S. 593 (1995), a case it describes as "closely analogous to this one." Maj. Op. at 10. I can do little to improve on the majority's description of that case, which upheld the restriction of the disclosure of a confidential wiretap as applied to a federal district judge. Like the other cases discussed above, that holding is not on point for the issue before us. First, although it is true that the Court relied in part on the "special duties of nondisclosure" associated with Aguilar's position as a federal judge, the Court also stressed the fact that the statute at issue there did "not impose such a restriction [on disclosure] generally, but only upon those who disclose wiretap information 'in order to obstruct, impede, or prevent' the interception." *United States v. Aguilar*, 515 U.S. 593, 605 (1995) (quoting 18 U.S.C. § 2232(c) (current version at 18 U.S.C. § 2511(1)(c))), so at least one ground of the *Aguilar* decision has no application here. Second, we are not charged today with deciding the validity of the restriction placed on McDermott's speech

by the House Committee rule. If we were, then perhaps this would be an analogous case governed by *Aguilar*. The statute at issue in *Aguilar* was closely connected with the "special duty of nondisclosure" that limited the defendant's First Amendment rights. The Supreme Court concluded that a "Federal District Court Judge who learned of a confidential wiretap application from the judge who had authorized the interception, and who wished to preserve the integrity of the court," *Aguilar*, 515 U.S. at 606, had no First Amendment defense against a statute prohibiting "the disclosure of information that a wiretap has been sought or authorized," *id.* at 602. It does not follow that Representative McDermott's violation of a House Committee rule deprives him of a First Amendment defense to every other nondisclosure law, including § 2511(c)—which in this case is unrelated to whatever "special duty of nondisclosure" McDermott may have had as a member of Congress. Rather, we are charged with determining the constitutionality of applying § 2511 in circumstances directly paralleling those considered by the Supreme Court in *Bartnicki*. The Court in *Bartnicki* upheld the constitutional protection of the possessor of information originally obtained through an unlawful eavesdropping by another. *Aguilar* in no way speaks to that question.

Again, were we considering the validity of the Committee's rule as applied to McDermott's conduct, the cases relied upon by the majority would be instructive—perhaps compelling. But we are not. If the House Committee rules created a private right of action—a most dubious possibility—those cases would be instructive. But neither of those theories is before us. We are reviewing a case governed by *Bartnicki*, and *Bartnicki's* holding should prevail. Under that holding, we should reverse the decision of the district court and order this case dismissed.

B.

I note that the district court declined to apply *Aguilar* on the theory that "it is outside the realm of the courts to construe Congressional rules that present significant ambiguities." *Boehner v. McDermott*, 332 F. Supp. 2d 149, 162 (D.D.C. 2004). I fully agree. As the district court noted, *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), "permits [the courts] to take limited judicial cognizance of the [Ethics Committee Rules]." *Boehner v. McDermott*, 332 F. Supp. 2d 149, 162 (D.D.C. 2004). However, as the district court further noted, *Rostenkowski* also "makes clear that it is outside the realm of the courts to construe Congressional rules that present significant ambiguities." *Id.* (citing 59 F.3d at 1312). Again, I fully agree. The *Rostenkowski* Court correctly stated, as the district court noted, that the courts "cannot presume to interpret [the rule]" of a House of Congress when that rule contains ambiguity. *See id.* We must leave for the coordinate branch of government the interpretation of its own rules. Committee Rule 9 states that "Committee members and staff shall not disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee." *See* Maj. Op. at 11. From the face of the rule, it is hardly unambiguous that the rule forbids disclosure of information obtained by a member – such as McDermott – from private citizens such as the Martins. The tape in question had never become the possession of the Committee, although the Martins may well have intended that it do so. Nor is it by any means pellucid that the tape was "evidence related to an investigation" within the meaning of the rule at the time the Martins turned it over to McDermott. The release by McDermott was not in violation of an unambiguous rule.

Neither can I subscribe to the majority's confidence that the Ethics Committee's Report on McDermott's conduct removes all ambiguity. As the majority notes, the Committee ruled only that "his disclosure . . . was inconsistent with the spirit of the applicable rules and

represented a failure on his part to meet his obligations as Ranking Minority Member of the House Select Committee on Ethics." *See* Maj. Op. at 13. The very incorporation of the phrase "inconsistent with the *spirit of the applicable rules*" would seem to defeat a claim that the Committee had determined that the rules unambiguously applied to his conduct.

To the extent the court holds that Representative McDermott forfeited his First Amendment protection either by conducting himself inconsistently with the "spirit" of Rule 9 or by violating the terms of House Rule 23—which states that "[a] Member . . . shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof"—its holding suffers from a separate defect. Abrogating Representative McDermott's First Amendment protections because he violated the "spirit" of a rule contravenes the well-established principle that vague restrictions on speech are impermissible because of their chilling effect, *see Reno v. ACLU*, 521 U.S. 844, 871-72 (1997), and because of "the need to eliminate the impermissible risk of discriminatory enforcement," *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991). Plainly, subjecting a Member of Congress to liability for violating the "spirit" of a rule burdens political speech in the vaguest of ways, leaving the Member to "guess at [the] contours" of the prohibition. *Id.* at 1048. Nothing in *Aguilar* countenances such a result.

For the reasons set forth above, I respectfully dissent.

United States
Court of Appeals
for District of
Columbia Circuit
Filed
Dec. 5, 2006

CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7203

SEPTEMBER TERM, 2006

98cv00594

JOHN A. BOEHNER,

APPELLEE

V.

JAMES A. MCDERMOTT,

APPELLANT

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh*, Circuit Judges

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ORDER

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* Circuit Judge Kavanaugh did not participate in this matter.

It is ORDERED, on the court's own motion, that oral argument before the en banc court will be heard at 9:30 a.m. on Thursday, January 25, 2007. It is

FURTHER ORDERED that the parties submit thirty (30) copies each of supplemental briefs in accordance with the following briefing format and schedule:

Brief for Appellant (not to exceed 15 pages)	December 22, 2006
Brief for Appellee (not to exceed 15 pages)	January 8, 2007
Reply Brief for Appellant (not to exceed 7 pages)	January 16, 2007

The briefs are to be limited to the issue whether *United States v. Aguilar*, 515 U.S. 593 (1995), limits First Amendment protection of McDermott's disclosure.

Because the briefing is keyed to the date of argument, the court will grant requests for extension of time limits only for extraordinarily compelling reasons. The parties are directed to serve and file their submissions by hand.

All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. *See* D.C. Cir. Rule 28(a)(7).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Nancy G. Dunn
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7203

SEPTEMBER TERM, 2005

Filed On: June 23, 2006

98cv00594

JOHN A. BOEHNER,

APPELLEE

V.

JAMES A. MCDERMOTT,

APPELLANT

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh*, Circuit Judges

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ORDER

Upon consideration of appellant's petition for rehearing en banc, the response thereto, and the vote in favor of the petition by a majority of the judges eligible to participate, it is

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* Circuit Judge Kavanaugh did not participate in this matter.

ORDERED that the petition be granted. This case will be reheard by the court sitting en banc on Thursday, September 28, 2006, at 9:30 a.m. in Courtroom #20, Sixth Floor. It is

FURTHER ORDERED that the court's judgment filed on March 28, 2006, be vacated. It is

FURTHER ORDERED that the parties resubmit an original and 25 copies each of their previously filed briefs and the joint appendix within 15 days of the date of this order.

A separate order will issue regarding allocation or oral argument time.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:

Cheri Carter
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 15, 2005 Decided March 28, 2006

No. 04-7203

JOHN A. BOEHNER,

APPELLEE

V.

JAMES A. MCDERMOTT,

APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 98cv00594)

Frank Cicero, Jr. argued the cause for appellant. With him on the briefs was *Christopher Landau.*

Theodore J. Boutrous, Jr. and *Thomas H. Dupree, Jr.* were on the brief of *amici curiae* Dow Jones & Company, Inc., et al. in support of appellant.

Michael A. Carvin argued the cause for appellee. With him on the brief was *Louis K. Fisher.*

Before: GINSBURG, *Chief Judge*, and SENTELLE and RANDOLPH, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Circuit Judge* SENTELLE.

RANDOLPH, *Circuit Judge*: After the Supreme Court vacated our decision in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999) (*Boehner I*), and returned the case to

us for further consideration in light of *Bartnicki v. Vopper*, 532 U.S. 514 (2001), *see* 532 U.S. 1050 (2001), we remanded the case to the district court; the parties engaged in discovery; and, on cross motions, the district court granted summary judgment in favor of Representative John A. Boehner, awarding him $10,000 in statutory damages, *see* 18 U.S.C. § 2520(c)(2), $50,000 in punitive damages, and reasonable attorney fees and costs. The issue on appeal is whether undisputed facts prove that Representative James A. McDermott "unlawfully" obtained the tape recording of an illegally-intercepted conversation in which Representative Boehner participated. *See Bartnicki*, 532 U.S. at 532 n.19.

Plaintiff John A. Boehner represents Ohio's Eighth District; defendant James A. McDermott represents Washington's Seventh District. The complaint alleged that Representative McDermott violated 18 U.S.C. § 2511(1)(c) when he disclosed an illegally-intercepted conversation in which Representative Boehner participated. The record developed in discovery showed the following.

On December 21, 1996, Representative Boehner participated in a conference call with members of the Republican Party leadership, including then-Speaker of the House Newt Gingrich. At the time of the conversation Gingrich was the subject of an investigation by the House Committee on Standards of Official Conduct, commonly known as the House Ethics Committee. Representative Boehner was chairman of the House Republican Conference. The participants discussed various strategies regarding how to deal with an expected Ethics Subcommittee announcement of Gingrich's agreement to accept a reprimand and to pay a fine in exchange for the Committee's promise not to hold a hearing.

Representative Boehner was driving through Florida when he joined the conference call. He spoke from a

cellular telephone in his car. John and Alice Martin, who lived in Florida, used a police radio scanner to eavesdrop on the conversation, in violation of 18 U.S.C. § 2511(1)(a). They recorded the call and delivered a tape of the conversation in a sealed envelope to the Florida office of then-Representative Karen Thurman. The tape was forwarded to Thurman's Washington office. Thurman's chief of staff learned from her, on January 8, 1997, that the Martins would be visiting her office in Washington. Both Thurman and her chief of staff sought legal advice about accepting the tape. At some point they consulted then-Representative David Bonior's chief of staff and legislative director. Stan Brand, former General Counsel to the House of Representatives, advised that the tape should not be accepted under any circumstances and that it should be turned over to the Ethics Committee or other appropriate authorities. When the Martins arrived at Thurman's office, her chief of staff returned the tape in its unopened envelope and suggested that they turn it over to the Ethics Committee.

At about 5 p.m. on January 8, 1997, in a small anteroom adjacent to the Ethics Committee hearing room, the Martins delivered the tape to Representative McDermott in a sealed 8-1/2" by 11" envelope. At the time, Representative McDermott was the ranking Democrat on the Ethics Committee. A conversation between the Martins and Representative McDermott ensued, of which more hereafter. With the envelope the Martins also delivered a business card and a typed letter, dated January 8, 1997, and addressed to "Committee on Standards of Official Conduct . . . Jim McDermott, Ranking Member." The letter stated:

> Enclosed in the envelope you will find a tape of a conversation heard December 21, 1996 at about 9:45 a.m. The call was a conference call heard over a scanner. We felt the information included were of importance to the committee. We live in the 5th. Congressional District and attempted to give the tape to Congresswoman Karen

> Thurman. We were advised by her to turn the tape directly over to you. We also understand that we will be granted immunity.
>
> My husband and I work for Columbia County Schools in Columbia County Florida. We pray that committee will consider our sincerity in placing it in your hands.
>
> We will return to our home today.
>
> Thank you for your consideration.
>
> John and Alice Martin

Representative McDermott then returned to the Ethics Committee hearing room.

Later that evening, during a recess, Representative McDermott left the Ethics Committee hearing room and went to his office. There he opened the Martins' envelope, dumped out the contents, and listened to the tape. Still later, he called two reporters: Jeanne Cummings of the *Atlanta Journal-Constitution*, for whom he left a message, and Adam Clymer of the *New York Times*, whom he reached. Clymer went to Representative McDermott's office, listened to the tape, and made a recording of it. After Cummings returned Representative McDermott's call the next day, he invited her to his office and shared the tape with her.

On January 10, 1997, Clymer published a front-page article in the *New York Times* entitled "Gingrich Is Heard Urging Tactics in Ethics Case." The article, which included lengthy excerpts of the taped conversation, reported the circumstances leading to disclosure of the tape:

> The call was taped by people in Florida who were unsympathetic to Mr. Gingrich and who said they heard it on a police scanner that happened to pick up the cellular telephone transmission of one of the participants. It was

> given to a Democratic Congressman, who made the tape available to the New York Times. . . ..
>
> . . . .
>
> Mr. Gingrich, Mr. Bethune and the others discussed their tactics in a conference call, a transcript of which was made available by a Democratic Congressman hostile to Mr. Gingrich who insisted that he not be identified further.
>
> The Congressman said the tape had been given to him on Wednesday by a couple who said they were from northern Florida. He quoted them as saying it had been recorded off a radio scanner, suggesting that one participant was using a cellular telephone. They said it was recorded about 9:45 A.M. on Dec. 21.

Adam Clymer, *Gingrich Is Heard Urging Tactics in Ethics Case*, N.Y. TIMES, Jan. 10, 1997, at A1, A20. The *Atlanta Journal-Constitution* ran a similar story on January 11th.

On January 13, 1997, the Martins held a press conference and identified Representative McDermott as the Congressman to whom they delivered the tape. Representative McDermott then sent copies of the tape to the offices of the House Ethics Committee and resigned from the Committee. The Committee Chairman, Representative Nancy Johnson, forwarded the tape to the Justice Department. The government prosecuted the Martins for violating 18 U.S.C. § 2511(1)(a), the provision forbidding unauthorized interception of "wire, oral, or electronic communication." The Martins pled guilty and were fined $500.

On cross-motions for summary judgment the district court held that Representative McDermott violated 18 U.S.C. § 2511(1)(c) when he disclosed the tape to the reporters. *Boehner v. McDermott*, 332 F. Supp. 2d 149, 158 (D.D.C. 2004) (*Boehner II*). Section 2511(1)(c) makes intentional disclosure of any illegally-intercepted

conversation a criminal offense if the person disclosing the communication knew or had "reason to know" that it was so acquired. The *Bartnicki* Court held that under the First Amendment, § 2511(1)(c) was invalid as applied to individuals who lawfully obtained a tape of such a conversation and then disclosed it, 532 U.S. at 535;[1] the Court added that its holding did not apply to those who obtain the information unlawfully, *id.* at 532 n.19. The district court therefore viewed the crucial issue to be whether Representative McDermott lawfully obtained the tape from the Martins. *See Boehner II*, 332 F. Supp. 2d at 163-64. The court held that there was no genuine issue of material fact that the Martins' letter to Representative McDermott was on the outside of the envelope containing the tape and that he must have read it. *Id.* at 166-67, 169. This established Representative McDermott's knowledge of the Martins' illegal interception at the time he received the tape. It followed that he had not lawfully obtained the tape. *Id.* at 165-66, 169.

According to Representative McDermott, the district court misinterpreted *Bartnicki*. As he reads the Supreme Court's opinion, any individual who did not participate in the illegal interception of a conversation has a First Amendment right to disclose it.

It is true that in *Bartnicki* the defendants had no connection to the illegal interception. The tape of the conversation wound up in Yocum's mailbox, placed there

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[1] The Court also held that for the First Amendment to shield disclosure, the conversation must contain information of "public concern." 532 U.S. at 535. But *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which the Court refused to make the First Amendment turn on such a consideration in light of the "difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not . . .. We doubt the wisdom of committing this task to the conscience of judges." *Id.* at 346.

by some unknown person. 532 U.S. at 519, 525. Neither Yocum nor the radio broadcaster who played the tape on his program after Yocum gave it to him knew who had done the intercepting. The Court mentioned the anonymity of the interceptor several times, *id.* at 525, 530 & n.15, 531, 535, and distinguished this case on that ground:

> In the *Boehner* case, as in this suit, a conversation over a car cell phone was intercepted, but in that case the defendant knew both who was responsible for intercepting the conversation and how they had done it. 191 F. 3d, at 465. In the opinion of the majority, the defendant acted unlawfully in accepting the tape in order to provide it to the media. *Id.*, at 476.

532 U.S. at 522 n.5. We do not want to read too much into the Court's "but" in the first sentence, yet one must wonder why the Court drew this distinction if it meant to adopt the rule Representative McDermott urges on us. Elsewhere in the *Bartnicki* opinion the Court stressed that it had before it only an "as applied" challenge to the federal statute, *id.* at 524, 525; that in light of the facts of the case, the question presented was "narrow," *id.* at 517, 528, 529; and that it was deciding only that those who lawfully obtain information have a First Amendment right to disclose it to the public, *id.* at 525, 528 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979), and *Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989)). The Court also stated that its "holding, of course, does not apply to punishing parties for obtaining the relevant information unlawfully." *Id.* at 532 n.19.

Representative McDermott's reading of these and other statements of the Court is quite implausible. By his logic, if he stole the tape from the Martins he would have lawfully obtained it because he did not participate in the initial illegal interception. Among other statements in the majority opinion, footnote 19 – which we have just quoted – clearly stands for the opposite

proposition. Justice Breyer, in his concurring opinion, in which Justice O'Connor joined, understood as much. Citing footnote 19, he distinguished cases in which the person who disclosed the conversation "aided or abetted . . . the later delivery of the tape by the interceptor to an intermediary, or the tape's still later delivery by the intermediary to the media." *Id.* at 538 (Breyer, J., concurring) (citing the federal aiding and abetting statute, 18 U.S.C. § 2).

The eavesdropping statute may not itself make receiving a tape of an illegally-intercepted conversation illegal. *See id.* at 525, 528; *see also* 18 U.S.C. § 2511(1). But it does not follow that anyone who receives a copy of such a conversation has obtained it legally and has a First Amendment right to disclose it. If that were the case, then the holding in *Bartnicki* is not "narrow" as the Court stressed, but very broad indeed. On the other hand, to hold that a person who knowingly receives a tape from an illegal interceptor either aids and abets the interceptor's second violation (the disclosure), or participates in an illegal transaction would be to take the Court at its word. It also helps explain why the Court thought it so significant that the illegal interceptor in *Bartnicki* was unknown, *see* 532 U.S. at 519, 522 n.5, 525, 530 & n.15, 531, and why the Court distinguished this case on that ground, *see id.* at 522 n.5.[2]

As to the evidence, the district court stated that if Representative McDermott

> read the cover letter or the Martins related its relevant contents to him at the time [he] received

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[2] The Court added that "[i]n the opinion of the majority, the defendant [Representative McDermott] acted unlawfully in accepting the tape in order to provide it to the media." 532 U.S. at 522 n.5. (The case came to us on appeal from the dismissal of a complaint; our conclusion was based on a construction of the complaint. *See Boehner I*, 191 F.3d at 464 & n.1).

> the tape, he would have possessed sufficient knowledge of the illegal transaction to have unlawfully obtained the tape . . .. On the other hand, if [Representative McDermott] learned of the contents of the letter at some later time after taking possession of the tape, . . . the case more closely resembles *Bartnicki* . . ..

Boehner II, 332 F. Supp. 2d at 165-66. The court then reached two conclusions: the Martins' cover letter was outside the envelope containing the tape and Representative McDermott read it when the Martins' handed it to him, not when he later returned to his office to listen to the tape. *Id.* at 166-67, 169. Representative McDermott objects that both of the court's conclusions rested on material facts that were genuinely in dispute and that summary judgment was therefore improper. Our de novo review of the judgment, *see, e.g., Branch Ministries v. Rossotti*, 211 F.3d 137, 141 (D.C. Cir. 2000), supports his position.

The cover letter stated: "Enclosed in the envelope you will find a tape." But this does not prove that the letter was outside the envelope containing the tape. The tape was in fact "enclosed" regardless where the Martins placed the letter.[3] And even if the letter was outside the envelope, this does not prove that Representative McDermott read it at the time he received the tape. "[C]ommon sense" may indicate, as the district court wrote, "that one who accepts from strangers a package with a short accompanying letter is likely to read the letter . . .." *Boehner II*, 332 F. Supp. 2d at 166. But at the summary judgment stage, the nonmoving party is entitled to "all justifiable inferences" from the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see, e.g., Matsuhita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *Salazar v. Wash. Metro. Area*

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[3] The Martins apparently were not deposed.

Transit Auth., 401 F.3d 504, 507 (D.C. Cir. 2005). Here Representative McDermott did not simply rest on "allegations or denials of the adverse party's pleading." FED. R. CIV. P. 56(e). As Rule 56 requires, he adduced evidence – his deposition testimony – in which he denied ever having seen the letter. A justifiable inference from that evidence is that he did not read it.[4]

While there was a genuine issue of material fact regarding Representative McDermott's knowledge of the cover letter, we nevertheless conclude that Representative Boehner was "entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see Teamsters Local Union No. 61 v. United Parcel Serv., Inc.*, 272 F.3d 600, 603-04 (D.C. Cir. 2001); *Samii v. Billington*, 195 F.3d 1, 3 (D.C. Cir. 1999); *Doe v. Gates*, 981 F.2d 1316, 1322 (D.C. Cir. 1993). We start with the *New York Times* article. Clymer reported that a certain Congressman, later identified as Representative McDermott, "quoted" the interceptors (the Martins) as saying that the conversation was "recorded off a radio scanner." The evidence shows that there were only two ways Representative McDermott could have known this – from the cover letter or from his conversation with the Martins in the anteroom when they handed him the tape. We may eliminate the cover letter. As we have just said, Representative McDermott denied having read it. His denials were unequivocal—they were not of the I-do-not-recall-one-way-or-the-other variety. This leaves only the oral conversation. Unlike his unequivocal denial of ever having read the cover letter, Representative McDermott

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[4] Representative McDermott also makes much of his testimony that he did not know what was on the tape when he received it. But this is not evidence tending to show his failure to read the letter when the Martins handed him the tape. Even if he read the cover letter he would not have known what the tape contained. As to the contents of the tape, the letter said only that it would be "of importance to the committee."

does not deny that the Martins told him they used a scanner to intercept the conversation. He testified only that he could "not remember one way or another." Nor does Representative McDermott deny telling Clymer, the *New York Times* reporter, that the Martins told him they recorded the conversation over a scanner. He testified only that "I wouldn't say I didn't say it. I just don't recall it." This is insufficient to draw into dispute Representative Boehner's statement of undisputed facts that Representative McDermott told Clymer "that [the Martins] had heard and recorded the conversation over a police scanner on December 21, 1996 at 9:45 a.m." *See FEC v. Toledano*, 317 F.3d 939, 949-50 (9th Cir. 2002); *FDIC v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 205 F.3d 66, 75 (2d Cir. 2000). While a court should draw all justifiable evidentiary inferences in favor of the non-moving party, there is no such inference to draw in Representative McDermott's favor. *See Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 779-80 (5th Cir. 1997); *Crabbs v. Copperweld Tubing Prods. Co.*, 114 F.3d 85, 88 (6th Cir. 1997); *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 798 (7th Cir. 1995).

Because there was no genuine dispute that Representative McDermott knew the Martins had illegally intercepted the conversation, he did not lawfully obtain the tape from them. The Martins violated § 2511 not once, but twice – first when they intercepted the call and second when they disclosed it to Representative McDermott. It is of little moment whether Representative McDermott's complicity constituted aiding and abetting their criminal act,[5] or the formation

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[5] *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.2(a) (2d ed. 2003); *id.* § 13.2(b), at 344 ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state."); *United States v. Walker*, 99 F.3d 439, 442 (D.C. Cir.

of a conspiracy with them, or amounted to participating in an illegal transaction.[6] The difference between this case and *Bartnicki* is plain to see.[7] It is the difference

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1996) (explaining the "shared intent" standard for aiding and abetting as an "overlap with (but not necessarily match) the criminal intent of the principal"); *see also United States v. Yakou*, 428 F.3d 241, 252 (D.C. Cir. 2005) (stating the "long . . . established [principle] that a person can be convicted of aiding and abetting another person's violation of a statute even if it would be impossible to convict the aider and abettor as a principal").

[6] As Chief Judge Ginsburg wrote in the original appeal: "One who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not 'lawfully obtain[ed]'that information in any meaningful sense." *Boehner I*, 191 F.3d at 479 (Ginsburg, J., concurring) (alteration in original).

[7] Our dissenting colleague believes that the Supreme Court's resolution of the conflict between *Boehner I* and *Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), in favor of the Third Circuit's decision implicitly means that Representative McDermott had a First Amendment right to disclose the tape. Dissenting Op. at 2; *see also id.* at 5. If the Court had agreed with our colleague, it would have reversed our decision; instead, it vacated and remanded for reconsideration. Furthermore, one must pay close attention to the nature of the conflict between *Boehner I* and the Third Circuit's decision. We held that the statute was content neutral and that it was constitutional as applied, because it survived intermediate scrutiny. *Boehner I*, 191 F.3d at 467-70. The Third Circuit held that the statute was content neutral but did not survive intermediate scrutiny as applied. *Bartnicki*, 200 F.3d at 123-29. In resolving that conflict the Court held only that someone who lawfully obtains an illegally-intercepted conversation may disclose it, which still leaves the question we face in this case: whether Representative McDermott lawfully obtained the tape from the Martins.

Our colleague also thinks it matters little that the Supreme Court distinguished *Boehner I* on the ground that McDermott

between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is guilty of receiving stolen property, even if the ring was intended only as a gift.[8] *See* MODEL PENAL CODE § 223.6(1) (1962); D.C. CODE § 22-3232; *see also Williams v. United States*, 281 A.2d 293, 294 (D.C. 1971) (citing *Rugendorf v. United States*, 376 U.S. 528 (1964); *Wilson v. United States*, 162 U.S. 613, 619 (1896)) (explaining a prior version of § 22-3232).

Affirmed.

SENTELLE, J, *dissenting*: In the first eight paragraphs of its opinion, the majority accurately lays out the somewhat extended history of this case. Two persons not parties to the case unlawfully intercepted communications of the appellee and gave a tape of the communications to the appellant in violation of 18 U.S.C. § 2511(1)(a) and (1)(c). Appellee brought the present action, which the district court dismissed, reasoning this application of the statute violated the First Amendment guarantee to the right of free speech.

The defendant appealed. In a split decision, a panel of this court (identical to the present panel) reversed the dismissal, holding that the application of section

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may have participated in an illegal transaction. Dissenting Op. at 7-8. It matters little, he writes, because the Court did the distinguishing in the factual portion of the opinion. *Id.* But that makes our point. As we have explained, the facts of this case are, in important respects, quite different than those in *Bartnicki*.

[8] We do not understand Representative McDermott to be arguing that even if he unlawfully obtained the illegally-intercepted conversation, he had a First Amendment right to disclose the tape. *See generally Boehner I*, 191 F.3d 463; *id.* at 479 (Ginsburg, J., concurring).

2511(1)(c) and a parallel Florida statute "are not unconstitutional as applied in this case." *Boehner v. McDermott*, 191 F.3d 463, 478 (D.C. Cir. 1999); *see also id.* at 480 (Ginsburg, J., concurring). I disagreed with the majority's opinion then, as I do today. As I perceived the case then, and as I perceive it now, the issue is: "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?" *Id.* at 484-85 (Sentelle, J., dissenting) (quoted in *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2000)). I would have answered that question in the negative. While I thought the appropriate test to be a strict scrutiny applicable to content-based limitation on the exercise of free speech, *see id.* at 481 (Sentelle, J., dissenting), a proposition ultimately rejected by the Supreme Court in *Bartnicki*, I nonetheless would reach the same conclusion today under tests applicable to "content-neutral law[s] of general applicability." *Bartnicki*, 532 U.S. at 526. Moreover, I would reach such a conclusion with confidence, based on the Supreme Court's decision adjudicating the constitutionality of a similar application of this same statement in *Bartnicki*.

At approximately the same time that our prior decision was making its way to the Supreme Court, the Supreme Court granted certiorari in *Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), to answer precisely the issue before us in Boehner. *See Bartnicki v. Vopper*, 530 U.S. 1260 (2000) (granting certiorari). In *Bartnicki*, the Third Circuit had concluded that the application of 18 U.S.C. § 2511(1)(c) to prevent disclosure of information obtained by the disclosing person from a tape of unlawfully intercepted communications was constitutionally "invalid" because it "deterred significantly more speech than necessary to protect the privacy interests at stake." 532 U.S. at 522. The Supreme Court expressly granted certiorari "to resolve the conflict," between *Bartnicki* and our decision in *Boehner*. *Id.* The Supreme Court

affirmed the decision of the Third Circuit, *id.* at 535, and thereby resolved the conflict in favor of the Third Circuit's decision, not our decision in *Boehner*.

In *Bartnicki*, the chief negotiator for a Union Local, which was then engaged in negotiations on behalf of teachers with a local school board, used a cellular phone to call the president of the Union "and engage in a lengthy conversation about the status of the negotiations." *Id.* at 518. At one point in the conversation, referring to the school board's "intransigence," she said "'we're gonna have to go to their . . . homes . . . [t]o blow off their front porches . . . .'" *Id.* at 518-19. A local radio commentator, respondent in the Supreme Court, broadcast a tape of the conversation on a radio show. All parties agreed that the tape, like the tape of Boehner's conversation released by McDermott, was the result of an unlawful interception. The identity of the interceptor remained undisclosed throughout the litigation. The Union officers, like Boehner in the instant case, sued the publishers of the contents of the tape. In that case, the defendants included the broadcaster, the radio stations over which he made his broadcast, and the person who furnished the broadcaster with the tape, himself the head of a local citizens' group who testified that he had obtained the tape when it was left anonymously in his mailbox. Like Boehner in the case before us, plaintiffs relied on section 2511(1)(c) and a state statute of similar import. The district court granted summary judgment for the plaintiffs, rejecting the defendant's First Amendment defense. As noted above, the Third Circuit, in a divided opinion, disagreed, reversed the trial court, and remanded with directions to the district court to grant the summary judgment motions of the defendants on the basis of the First Amendment defense. *Bartnicki*, 200 F.3d at 129.

On *certiorari* the Supreme Court, as had the Third Circuit, ruled that the statute was content neutral and subjected the statute to review under the "intermediate scrutiny" standard. 532 U.S. at 521, 526. While that

standard is less stringent than the one I would have erroneously applied to the case before us, the result was nonetheless the one that I contended should have prevailed in *Boehner*. That is, the Supreme Court ruled that the statute was unconstitutional as applied.

In addressing the issue, the Supreme Court adopted my formulation:

> Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?

Id. at 528 (quoting *Boehner*, 191 F.3d at 484-85) (Sentelle, J., dissenting)). In analyzing the law on that subject, the Supreme Court first noted that "[a]s a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Id.* at 527 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979)). The Supreme Court then expressed its continuing belief "that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.* at 529 (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989)) (alteration in original). In applying that balance to the facts before it, the Court observed that the United States, appearing in the case to defend the constitutionality of the statute, had identified "two interests served by the statute." *Id.* The first of those interests was the removal of "an incentive for parties to intercept private conversations," and the second, to "minimiz[e] the harm to persons whose conversations have been illegally intercepted." *Id.* While the Court was willing to "assume that those interests adequately justify the prohibition in § 2511(1)(d) against the interceptor's own use of information . . . acquired by violating §

2511(1)(a)," the Court explicitly stated that "it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends." *Id.*

The Court easily dispensed with the first justification, opining that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." *Id.* The Court concluded, however, that "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Id.* at 529-30. It further noted that "there is no basis for assuming that imposing sanctions" on the communicating possessor of conversations illegally taped by another "will deter the unidentified scanner from continuing to engage in surreptitious interceptions." *Id.* at 531. Thus, the Court held that "the Government's first suggested justification for applying § 2511(1)(c) to an otherwise innocent disclosure of public information is plainly insufficient." *Id.* at 532.

However, the Court found the government's second justification, that is, the protection of privacy, "considerably stronger." *Id.* It noted the importance of privacy of communication and the legitimacy of the argument that "fear of public disclosure of private conversations might well have a chilling effect on private speech." *Id.* at 533. Nonetheless, the Court was convinced that the enforcement of section 2511(1)(c) on the facts before it, "implicat[ed] the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern." *Id.* at 533-34. In concluding that this second interest did not have sufficient strength to warrant the limitation on publication of truthful information of public concern, the Court reiterated the classic principle that "'[t]he right of privacy does not prohibit any publication of matter which is of public or general interest.'" *Id.* at 534 (quoting

SAMUEL D. WARREN & LOUIS D. BRANDEIS, *THE RIGHT TO PRIVACY*, 4 HARV. L. REV. 193, 214 (1890)).

In the light of the Supreme Court's resolution of the conflict between our *Boehner* decision and the Third Circuit's decision in its *Bartnicki* opinion, there is no justification for us to hold otherwise on the facts before us. There is no distinction of legal let alone constitutional significance between our facts and those before the Court in *Bartnicki*. As the majority admits, "[t]he *Bartnicki* Court held that under the First Amendment, § 2511(1)(c) was invalid as applied to individuals who lawfully obtained a tape of such a conversation and then disclosed it, 532 U.S. at 535." Maj. Op. at 6. That said, the majority is unable to produce a distinction between this case and *Bartnicki*. Granted, the majority states:

The difference between this case and *Bartnicki* is plain to see. It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is guilty of receiving stolen property, even if the ring was intended only as a gift.

Maj. Op. at 13-14 (footnotes omitted). In fact, the difference is not plain at all. In *Bartnicki* the Supreme Court expressly stated:

> The suit at hand involves the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know--or at least had reason to know--that the interception was unlawful.

532 U.S. at 517-18. The majority apparently would make the distinction between the two cases based on an analogy between a person who buys a diamond ring from a thief, and one who obtains a stolen diamond ring knowing it to be stolen or having at least good reason to

know that it was stolen. I see no such distinction, let alone a plain one of constitutional significance. The Supreme Court underlined the lack of constitutional significance of the communicator's knowledge that the interception had been unlawfully conducted. It stated that "[w]e accept petitioners' submission that the interception was intentional, and therefore unlawful, and that, at a minimum, respondents 'had reason to know' that it was unlawful." *Id.* at 525. The majority, apparently attempting to shore up its artificial distinction, states:

> As Chief Judge Ginsburg wrote in the original appeal: "One who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not 'lawfully obtain[ed]' that information in any meaningful sense."

Maj. Op. at 13 n.6 (quoting *Boehner*, 191 F.3d at 479 (Ginsburg, J., concurring)) (alteration in original).

The Supreme Court has directly dispelled that notion both in *Bartnicki* itself and previously. The Supreme Court in *Bartnicki* expressly stated, "[respondents'] access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else." 532 U.S. at 525. In support of this proposition the court cites and quotes *Florida Star*, which stated "[e]ven assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step." 491 U.S. at 536 (emphasis in original). Florida still has not taken that step, nor has Congress. Therefore, the otherwise-lawful receipt of unlawfully obtained information remains in itself lawful, even where the receiver knows or has reason to know that the source has obtained the information unlawfully.

Even less convincing is the majority's assertion that the Court mentioned the anonymity of the interceptor in *Bartnicki* several times and "distinguished this case on

that ground." Maj. Op. at 7. The so-called distinguishing of the case occurred in a footnote stating as follows:

> In the *Boehner* case, as in this suit, a conversation over a car cell phone was intercepted, but in that case the defendant knew both who was responsible for intercepting the conversation and how they had done it. In the opinion of the majority [of the D.C. Circuit], the defendant acted unlawfully in accepting the tape in order to provide it to the media.

532 U.S. at 522 n.5 (quoted at Maj. Op. at 7-8) (internal citations omitted). Today's majority hastens to say "[w]e do not want to read too much into the Court's 'but' in the first sentence, yet one must wonder why the Court drew this distinction if it meant to adopt the rule Representative McDermott urges on us." Maj. Op. at 8. The referenced footnote occurs in the Court's statement of the facts of the case and is never referenced in the legal analysis. Indeed, the footnote is subscribed to a textual sentence stating "[i]n so doing, [the Third Circuit dissenter] agreed with the majority opinion in a similar case decided by the Court of Appeals for the District of Columbia, *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999)." 532 U.S. at 522. If the Supreme Court in fact thought that the "distinction" was of constitutional significance, one must wonder why it thought the different results in the two circuit cases constituted a disagreement. This wonderment must be greatly enhanced upon reading the next sentence, which reads "[w]e granted certiorari to resolve the conflict." *Id.* The Supreme Court then goes on to resolve the conflict without making any further mention of any factual difference between the cases. To paraphrase the majority, one must wonder why the Court so easily dispensed with the distinction between one who knows who unlawfully intercepted a conversation and one who knows or has reason to know it was unlawfully intercepted. Indeed, the Supreme Court's disposition of the case lays to rest any distinction even between the one

who knows and the one who has reason to know. The Court reversed and remanded, directing entry of judgment for the defense on the constitutional theory. The record before the Court did not establish whether the defendants knew or only had reason to know of the unlawful obtaining of the conversations. If there were any such distinction in the High Court's view, the disposition would have been a vacatur and remand for the lower courts to establish upon which side of the "distinction" their case fell – that is, to determine whether the respondents knew or only had reason to know. As the Court made no such disposition, there is plainly no such distinction of constitutional magnitude.

The Supreme Court having decided the very issue of this case, that is, whether the United States (or Florida) can constitutionally bar the publication of information originally obtained by unlawful interception but otherwise lawfully received by the communicator, my opinion on whether that decision is correct or incorrect matters little. Nonetheless, I will venture to say that an opposite rule would be fraught with danger. Just as Representative McDermott knew that the information had been unlawfully intercepted, so did the newspapers to whom he passed the information. I see no distinction, nor has Representative Boehner suggested one, between the constitutionality of regulating communication of the contents of the tape by McDermott or by *The Washington Post* or *The New York Times* or any other media resource. For that matter, every reader of the information in the newspapers also learned that it had been obtained by unlawful intercept. Under the rule proposed by Representative Boehner, no one in the United States could communicate on this topic of public interest because of the defect in the chain of title. I do not believe the First Amendment permits this interdiction of public information either at the stage of the newspaper-reading public, of the newspaper-publishing communicators, or at the stage of Representative McDermott's disclosure to the news media. Lest someone draw a distinction between

the First Amendment rights of the press and the First Amendment speech rights of nonprofessional communicators, I would note that one of the communicators in *Bartnicki* was himself a news commentator, and the Supreme Court placed no reliance on that fact.

In sum, I respectfully dissent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN A. BOEHNER,
Plaintiff,
v.
JAMES A. McDERMOTT,
Defendant.
Civ. No. 98-0594 (TFH)

MEMORANDUM OPINION

Pending before the Court are Plaintiff and Defendant's cross motions for summary judgment. Because both motions relate to the same set of facts and issues, the Court will rule on both motions simultaneously. Upon careful review of both motions, oppositions, replies thereto, and the entire record herein, the Court will grant Defendant's motion in part and deny the motion in part, and the Court will grant in part and deny in part Plaintiff's motion. [1]

I. BACKGROUND

This case results from a disclosure made by Defendant James McDermott to members of the press concerning an illegal intercept of a conference call

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[1] While Plaintiff indicated that he was willing to forego oral arguments, *see* Notice of Supplemental Authority at 2, Defendant "would welcome oral argument." Response to Notice of Supplemental Authority at 2. Pursuant to Local Civil Rule 7(f), the Court exercises its discretion and declines to schedule oral arguments on these motions. The pleadings submitted are very thorough, well-written, and detailed, and oral arguments would only serve to delay this case.

between Plaintiff John Boehner and several House Republican leaders. McDermott is a Democratic member of the House of Representatives, representing the Seventh District of Washington, and Boehner is a Republican member of the House of Representatives, representing the Eighth District of Ohio. The subject of the conversation was a discussion of potential responses to the House Ethics Committee Probe of then-House Speaker Newt Gingrich. Boehner Dep. at 15–16.

Boehner participated in the conference call on a cellular phone inside his car while parked at a Waffle House restaurant in northern Florida. Boehner Dep. at 9. The conference call was electronically intercepted by a Florida couple, Alice and John Martin, using a radio scanner. Def.'s Ans. ¶ 8. The Martins recorded the call and then delivered that tape to the Gainesville, Florida office of Democratic Representative Karen Thurman, who at the time represented the Fifth District of Florida. *See id.* ¶ 10. Representative Thurman advised the Martins to deliver the tape to Defendant, who was then a ranking Democratic member of the House Committee on Standards of Official Conduct ("House Ethics Committee"). *See* Cover letter of 1/8/1997 that the Martins presented to Defendant along with the tape (hereinafter "Cover Letter") (found at Pl.'s Statement of Undisputed Facts ("SUF") Ex. B-8).

On January 8, 1997, the Martins personally delivered a copy of the tape enclosed in an envelope to McDermott in the anteroom of the House Ethics Committee (the "Committee") in Washington, D.C. McDermott Dep. at 157–58. Along with the tape was a letter explaining that the tape contained "a conference call heard over a scanner," and that "[the Martins] understand that [the Martins] will be granted immunity." Pl.'s SUF Ex. B-8 (Cover Letter). Before this encounter, McDermott claims to have had no knowledge of either the Martins or the tape. *See* McDermott Decl. ¶ 3 (found at Def.'s Opp'n Ex. F). McDermott later that evening returned to his office, opened the envelope, and listened to the tape.

McDermott Dep. at 162. He maintains, however, that he has no recollection of seeing the accompanying letter at any time prior to his disclosure. *Id.* at 150.

That evening and the following day, McDermott disclosed the tape to the *New York Times* and the *Atlanta Journal-Constitution* *Id.* at 174–75. The *New York Times* published a story regarding the contents of the disclosed tape on the front page of its January 10, 1997 edition. Adam Clymer, *Gingrich is Heard Urging Tactics in Ethics Case*, N.Y. Times, Jan. 10, 1997, at A1 (found at Pl.'s SUF Ex. B-2). The article references only an anonymous Congressional source, but McDermott acknowledges that he was the source. McDermott Dep. at 220–21. At a press conference on January 13, 1997, the Martins declared that they were responsible for intercepting Plaintiff's conversation and identified McDermott as the person to whom they delivered a copy of the conversation. Def.'s Ans. ¶ 24. Only after the Martins' press conference did McDermott deliver copies of the conversation to other members of the House Ethics Committee. *Id.* 25. McDermott resigned from the committee the same day *Id.*

II. PROCEDURAL HISTORY

Plaintiff filed a complaint on March 9, 1998 alleging that Defendant knowingly disclosed an unlawfully intercepted communication in violation of federal wiretapping statue, 18 U.S.C. 23 § 2511(1)(c),[2] and a

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[2] 18 U.S.C. § 2511 provides, in pertinent part, that

(1) Except as otherwise specifically provided in this chapter any person who-. . . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

. . . .

Florida wiretapping statue, Fla. Stat. § 934.03(1)(c).[3] Plaintiff seeks recovery for damages under 18 U.S.C. § 2520 and Fla. Stat. § 934.10 that authorize private actions to recover for violations of the federal and state wiretapping statutes, respectively. This Court granted Defendant's motion to dismiss, finding that the First Amendment protected the disclosure of lawfully obtained information. *Boehner v. McDermott*, No. CIV. 98-594, 1998 WL 436897, *7 (D.D.C. July 28, 1998), *rev'd*, 191 F.3d 463 (D.C. Cir. 1999). The United States Court of Appeals for the District of Columbia reversed this Court by distinguishing McDermott's conduct from the controlling precedent in *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) ("If a newspaper lawfully obtains truthful information about a matter of public significance, then [the government] may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.") (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)). *See Boehner v. McDermott*, 191 F.3d 463, 470–76 (D.C. Cir. 1999), vacated by 532 U.S. 1050 (2001). The Court of Appeals found that the federal and state wiretapping statutes were not unconstitutional as applied to McDermott. 191 F.3d at 478. The Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case in light of its decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *McDermott v. Boehner*, 532 U.S. 1050 (2001). Finally, on remand from the Supreme Court, the Court of Appeals reversed this Court's dismissal of the case and remanded, stating "[w]e also conclude that we would benefit from having the district court pass upon the arguments that have taken on new-found importance after *Bartnicki*." *Boehner v.*

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shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

[3] Fla. Stat. § 934.03(1)(c) provides substantively identical language as 18 U.S.C. § 2511(1)(c).

McDermott, 22 Fed. Appx. 16, No. 98-7156, 2001 WL 1699420 (D.C. Cir. 2001).

Plaintiff filed the instant motion for summary judgment on Dec. 16, 2002. In that motion, Plaintiff claims that Defendant's knowledge that the tape was illegally intercepted and his subsequent disclosure of the tape to members of the press "triggers liability for both statutory and punitive damages." Pl.'s Mot. at 5. Defendant also filed a motion for summary judgment on Dec. 16, 2002, asserting that because the facts in the instant case are indistinguishable from *Bartnicki*, his disclosure was protected by the First Amendment. Def.'s Mot. at 12–13. Defendant also claims that the Florida statute does not apply to a disclosure that occurred entirely outside of Florida. *Id.* at 12.

III. MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (stating that a court may enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). A material fact is one that "might affect the outcome of the suit under the governing law . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* In reviewing a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inference are to be drawn in his favor." *Id.* at 255. However, "[o]nly disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Id.* at 248. "Credibility

determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ." *Id.* at 255. Therefore, a trial court should use caution when granting summary judgment "where there is reason to believe that the better course would be to proceed to a full trial." *Id.*

Building on Anderson, our Court of Appeals stated that

> [i]n deciding whether there is a genuine issue of fact before it, the court must assume the truth of all statements proffered by the party opposing summary judgment — subject to an exception [that some statements are so conclusory as to come within an exception to that rule]. This is the standard even when the court entertains grave doubts about such a statement; like the weighing of evidence generally, the task of determining the credibility of a witness is the exclusive domain of the finder of fact.

Greene v. Dalton, 164 F.3d 671, 674 (D.C. Cir. 1999) (citations omitted).

IV. DISCUSSION

A. Applicability of the Florida Statute

Florida Statute § 934.03 provides language substantively identical to 18 U.S.C. § 2511, under which Plaintiff also seeks recovery, as well as to the analogous D.C. Code § 23-542. The Court, however, must assess the applicability of Florida law to the facts of this case, most of which occurred in the District of Columbia.

The locations of the events of this case are not in dispute. Plaintiff participated in a cell phone conversation in Florida that the Martins electronically intercepted in Florida. Boehner Dep. at 9; Def.'s Ans. ¶ 8. The Martins then traveled to the District of Columbia and delivered a copy of the recording to Defendant there. McDermott Dep. at 157–63. Defendant accepted materials from the Martins in the District of Columbia

and subsequently disclosed that information to the media in the District of Columbia. *Id.* at 157–63, 174–75. Based on these events, Plaintiff claims that Defendant violated Florida Stat. § 934.03(c), which prohibits disclosure of unlawfully intercepted communications. Pl.'s Mot. at 9.

Defendant argues based on two separate grounds that the Florida wiretapping statute does not apply to Defendant's disclosure in the District of Columbia. First, Defendant argues that Plaintiff has not established the Florida forum contacts constitutionally required under the Due Process and the Full Faith and Credit clauses. Def.'s Mot. at 23–25. Second, Defendant maintains that even if Florida law may be constitutionally applied in this case, Florida's strong presumption against extraterritorial application of its law prevents this Court from so extending the Florida statute. *Id.* at 21–23.

The due process and the full faith and credit clauses of the Constitution require that, in order to apply a state's law in a given case, the state "must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 312–13 (1981). Plaintiff first attempts to circumvent this constitutional requirement by demonstrating similarity between Florida wiretapping statute and the D.C. code wiretap provisions. Pl.'s Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Opp'n") at 18. Where an extraterritorial statute demonstrates no material conflict with locally applicable law, Plaintiff argues, there can be no "injury" and thus no constitutional issue raised by applying the extraterritorial statute. *Id.* Plaintiff draws this principle from *Phillips Petroleum Co. v. Shutts* in which the Supreme Court reviewed a state court's application of local law in favor of the law of fora more closely tied to the events of the case. 472 U.S. 797, 818 (1985).

Here, however, because Plaintiff failed to state a claim under the applicable D.C. Code provision, there is no selection to be made between Florida and District of Columbia. Extending the reasoning in *Phillips* to permit the application of Florida law in this case merely because of its similarity to the D.C. code would necessarily subject Defendant to claims under the laws of any state that evince sufficient similarity to the D.C. Code. Such reasoning is plainly incorrect and in direct opposition to the minimum contacts requirement established in *Allstate*.

Plaintiff fails to establish sufficient contacts between the events of this case and the state of Florida to constitutionally permit the application of Florida law. Plaintiff cites Defendant's testimony that "they [the Martins] told me they were in North Florida." Pl.'s Opp'n at 18 n.16 (citing Pl.'s SUF Ex. A, McDermott Dep. 158:11–12). Such incidental contact, however, is insufficient to demonstrate the "significant" Florida contact required. Rather, Plaintiff must show that Defendant "voluntarily and purposefully availed himself of the protection of the forum state's laws." *Richter v. Analex Corp.*, 940 F. Supp. 353, 359 (D.D.C. 1996) (quoting *Reiman v. First Union Real Estate Equity & Mortgage Investments*, 614 F. Supp. 255, 257 (D.D.C.1985)); *see also American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211, 1216 (11th Cir. 2000) (requiring that a party perform some act by which it purposefully avails itself of forum law in order for that law to apply). Even if injuries incidentally flowed to parties in Florida as a result of Defendant's acts in the District of Columbia, that fails to demonstrate that Defendant purposefully availed himself of Florida law.

Plaintiff further alleges Florida contacts based on the reasoning that the state of Florida has suffered the adverse effects of "chilling" private speech due to Defendant's alleged violation. Pl.'s Opp'n at 17 (citing *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C.

Cir. 1993) (indicating that applying the law of the forum in which "adverse effects" are suffered is one of three scenarios that defeat a presumption against extraterritorial application of statutes)). *Massey*, however, dealt not with the issue of applying one state's law to another United States judicial forum, but instead with the issue of applying United States law to foreign matters. That holding does not directly address the Full Faith and Credit or the Due Process Clause requirements set forth in *Allstate*. Further, it is difficult to perceive how Defendant's actions in the District of Columbia would inflict any more severe a chilling effect on Florida than on any other state merely because the intercepted conversation originally occurred in Florida.

Even if Florida law could constitutionally apply in this case, Florida's strong presumption against extraterritorial application of its law prohibits its application in this case. Florida courts have consistently declined to apply Florida law outside territorial boundaries unless a statute contains an "express intention that its provisions are to be given extraterritorial effect." *Burns v. Rosen*, 210 So. 2d 629, 630 (Fla. Dist. Ct. App. 1967); *see also Southeastern Fisheries Ass'n, Inc. v. Dep't of Natural Res.*, 453 So. 2d 1351, 1355 (Fla. 1984) (declining to extend law extraterritorially absent express intent of the legislature to do so). Plaintiff's reliance on *Massey* to avoid this problem is again misplaced here as that case does not address Florida's application of Florida law to other states but rather the application of United States law to foreign matters. Thus, even if constitutionally permissible, this Court cannot contravene the Florida courts' requirement of expressed legislative intent to apply its law extraterritorially.

Therefore, Defendant is entitled to summary judgment regarding Fla. Stat. §§ 934.03, 934.10 because Defendant did not avail himself of the protection of Florida law and because the Florida statute does not apply extraterritorially.

B. Significance of the Vacated Court of Appeals Decision

As discussed earlier, this case first came before the Court of Appeals for the District of Columbia on an appeal from this Court's granting of Defendant's original motion to dismiss. *Boehner*, 191 F.3d at 466. The Court of Appeals reversed this Court's ruling and denied Defendant's motion to dismiss. *Id.* at 478. Defendant appealed, and subsequently the Supreme Court issued an order granting certiorari, vacating the judgment of the Court of Appeals, and remanding the case (the "GVR" order) for further consideration in light of its recent decision in *Bartnicki*. 523 U.S. 1050 (2001). The Court of Appeals, in turn, reversed the judgment of this Court, remanded the case, and allowed Plaintiff to file an amended complaint. 22 Fed. Appx. at 17. The parties now dispute the significance, if any, of the vacated Court of Appeals judgment.

As a preliminary matter, because the ruling by the Court of Appeals came on a motion to dismiss, that court was constrained to "take as true the allegations made by [Plaintiff] in his complaint." *Boehner*, 191 F.3d 463, 464 n.1. On motions for summary judgment, this Court accepts all evidence in favor of the non-moving party and is not bound by the factual assertions accepted by the Court of Appeals. Defendant is correct in asserting that a general order of the Supreme Court vacating the judgment of the Court of Appeals "deprives [the Court of Appeals's] opinion of precedential effect." *Los Angeles County v. Davis*, 440 U.S. 625, 634 n.6 (1979) (quoting *O'Connor v. Donaldson*, 422 U.S. 563, 577–78 n.12 (1975)). The Supreme Court's GVR order in this case, however, was not a general vacation but rather a specific order vacating the Court of Appeals' judgment and remanding for further consideration in light of the Supreme Court's decision in *Bartnicki*. *Boehner*, 532 U.S. 1050. Such a GVR order that directs reconsideration in light of a new Supreme Court decision "is of a much more limited nature" than a general vacation. *United States v.*

M.C.C. of Florida, Inc., 967 F.2d 1559, 1562 (11th Cir. 1992) (determining that a GVR order issued by the Supreme Court instructing further consideration in light of a recent decision did not "nullify all prior proceedings"). Further, "[v]acatur and remand by the Supreme Court . . . does not create an implication that the lower court should change its prior determination." *Hughes Aircraft Co. v. United States*, 140 F.3d 1470, 1473 (Fed. Cir. 1998).

Additionally,

> [a]lthough a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law of the . . . Circuit.

Kurtz v. Baker, 644 F. Supp. 613, 621 (D.D.C. 1986) (citing *Davis*, 440 U.S. at 646 n.10 (Powell, J., dissenting)). Although no longer the law of the case, a vacated opinion may serve as a valuable source of guidance on the legal issues raised in the absence of contrary authority. *Christianson v. Colt Indus. Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir. 1989) (holding that an opinion vacated on jurisdictional grounds "stands as the most comprehensive source of guidance available on the . . . questions at issue in this case"). Moreover, "where [a] circuit court decision is vacated for reconsideration, rulings on unrelated issues continue to have precedential effect." *Metro. Wash. Airports Auth. Prof'l Fire Fighters Ass'n Local 3217 v. United States*, 959 F.2d 297, 304–05 (D.C. Cir. 1992) (paraphrasing the D.C. Circuit rule regarding vacated opinions established in *Action Alliance of Senior Citizens v. Sullivan*, 930 F.2d 77, 83–84 (D.C. Cir. 1991)); *see also Edmond v. U.S.P.S. Gen. Counsel*, 949 F.2d 415, 424 n.17 (D.C. Cir. 1991) ("Indeed, this circuit has more than once cited [a particular vacated opinion] as authority for legal

propositions that were not disturbed by the decision on rehearing.").

Consequently, while Defendant accurately asserts that the vacated Court of Appeals decision does not strictly bind this Court, prudence counsels against wholly disregarding the residual authority of the vacated opinion. The Court of Appeals's reverse and remand order clarified the scope of this Court's current task. In that order, the Court of Appeals indicated it would benefit from this Court "pass[ing] upon the arguments that have taken on new-found importance after *Bartnicki*." *Boehner*, 22 Fed. Appx. at 17. The Court of Appeals also indicated that "the constitutional issues now raised may more readily be decided if [Plaintiff] is given an opportunity to amend his complaint." *Id.* The scope of this Court's task on remand is thus clear. In its determination of summary judgment, this Court will take into account Plaintiff and Defendant's amended arguments, the new evidence submitted, and the entire record herein. Further, the Court will assess these arguments in light of all existing authority, including the Court of Appeals's vacated opinion and the Supreme Court's decision in *Bartnicki*.

C. The Scope of First Amendment Protection

At issue throughout this ongoing litigation has been the scope of protection afforded by the First Amendment as it applies to Defendant in this case. To refine the First Amendment issue presented, it is helpful to characterize with particularity the events giving rise to the instant dispute. First, it is undisputed that the Martins' initial act in recording Plaintiff's conference telephone conversation on December 21, 1996 violated 18 U.S.C. § 2511(1)(a), prohibiting the intentional intercept of electronic communications. Def.'s Ans. ¶¶ 8, 30. The Martins were charged with and pleaded guilty to this offense on April 25, 1997, and were each fined $500. Def.'s Opp'n Ex. T (DOJ Press Release Regarding Martins' Sentencing). Second, it is undisputed that the

Martins disclosed the recording to McDermott on January 8, 1997. McDermott Dep. at 157–63. Both the Court of Appeals and this Court noted that by this disclosure of unlawfully obtained material the Martins likely violated 18 U.S.C. § 2511 again, although they were not charged with that separate offense. *Boehner*, 191 F.3d at 475–76 (concluding that "[t]he Martins violated § 2511 not once, but twice — first when they intercepted the call and second when they disclosed it to McDermott); *Boehner*, 1998 WL 436897, at *4 (noting that "the wiretap statutes prohibit the Martins' interception, and the Martins' disclosure of the tape"). The third significant event leading to the ultimate public disclosure of the tape was McDermott's receipt and retention of the tape and cover letter from the Martins. As will be addressed in subsequent analysis, the parties dispute the lawfulness of this third event. Fourth and finally, the parties do not dispute that on the evening of January 8, 1997, McDermott disclosed the material he received from the Martins to the press. McDermott Dep. at 183.

As a preliminary matter, the Court finds that by the time Defendant disclosed the tape to the media, he knew or had reason to know that the tape had been obtained through the unlawful interception of communications. Upon discovering that the tape presented by the Martins, two private citizens from Florida, contained a recorded telephone conversation among several high level government representatives, Defendant would have every reason to realize that the conversation had been illegally intercepted. Defendant concedes that he drew a similar conclusion upon listening to the tape, stating that "I had a CB radio in my car and I used to listen to people's conversations all the time. So I could imagine that that might have been how [the recording] happened. . . . [T]hat's kind of what I thought when I heard it." McDermott Dep. at 181. Further, Defendant acknowledges that he did not believe the Martins had been invited participants in the call. *Id.* at 182–183. Finally, it is undisputed that, after listening to the tape,

Defendant proceeded to intentionally disclose the contents of the tape to several members of the media, including Adam Clymer of the *New York Times* on January 8, 1997. *Id.* at 183, 186–87. As a result, the Court finds that Defendant violated 18 U.S.C. § 2511(1)(c).

In *Bartnicki*, the Supreme Court held that where information of public importance is illegally intercepted, 18 U.S.C. § 2511(1)(c) is unconstitutional as applied to a third party who lawfully receives the intercepted information and discloses it to the media. 532 U.S. at 535 (stating that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern"). In light of *Bartnicki*, the issue now squarely before this Court is whether 18 U.S.C. § 2511(1)(c) is unconstitutional under the First Amendment as applied to Defendant in this case. Put another way, the issue is whether the First Amendment shields Defendant's disclosure from liability under the applicable wiretapping statutes.

Like this case, *Bartnicki* also involved information initially obtained in violation of 18 U.S.C. § 2511 and subsequently disclosed by a third party. In *Bartnicki*, a radio commentator and several other media defendants published information from a tape which contained an illegally intercepted cell phone conversation between the petitioners. *Bartnicki*, 532 U.S. at 518. The *Bartnicki* petitioners were at the time involved in contentious negotiations between a union representing teachers and a local school board, and in their intercepted conversation they made several comments apparently threatening physical harm in regard to the negotiations. *Id.* at 518–19. The tape was discovered by respondent Yocum in his mailbox, and the source of the tape was never identified. *Id.* at 518–19.

Due to the procedural posture of *Bartnicki*, the Supreme Court "accept[ed] respondents' submission on three factual matters that serve to distinguish most of the

cases that have arisen under § 2511." *Id.* at 525. Specifically, the Supreme Court accepted that the respondents played no part in the illegal interception, that their access to the information was obtained lawfully, and that the conversations dealt with a matter of public concern. *Id.* The Supreme Court noted that, despite obtaining the material lawfully themselves, respondents at minimum had "reason to know" the original interception was unlawful presumably by the time of their respective disclosures.[4] *Id.* The Supreme Court stated that the case "present[ed] a conflict between interests of the highest order — on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech." *Id.* at 518. Ultimately, the Supreme Court held that such disclosures were protected by the First Amendment because "[i]n these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance." *Id.* at 534. The Supreme Court concluded "that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* at 535.

In reaching this conclusion, however, the Supreme Court noted that its "holding, of course, does not apply to punishing parties for obtaining the relevant information

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[4] While not specifying at what point it charged the respondents in *Bartnicki* with "reason to know" of the illegality of the original interception, *see Bartnicki*, 532 U.S. at 524–25, the Supreme Court noted respondent Yocum's testimony that he initially discovered only a tape anonymously placed in his mailbox and that he "recognized the voices of Barnicki and Kane." *Id.* at 519. The Supreme Court thus presumably charged Yocum with knowledge of the illegality of the original interception at some point after receiving and listening to the tape but prior to disclosing it. *Id.* at 525.

unlawfully." *Id.* at 532 n.19. In his concurring opinion, Justice Breyer addressed the lawfulness of the third party in obtaining the information. He stated that "[n]o one claims that [the media respondents] ordered, counseled, encouraged, or otherwise aided or abetted the interception, the later delivery of the tape by the interceptor to an intermediary, or the tape's still later delivery by the intermediary to the media." *Id.* at 538 (Breyer, J., concurring). Justice Breyer agreed with the majority's holding, but he "would not extend th[e] holding beyond [the] present circumstances." *Id.* at 541 (Breyer, J., concurring).

Defendant asserts that this case is indistinguishable from *Bartnicki*. Plaintiff, however, raises three separate grounds which, if valid, would serve to distinguish this case from *Bartnicki*: (1) whether, in light of *United States v. Aguilar*, 515 U.S. 593 (1995), Defendant's disclosure violated special duties imposed on him as then-ranking member of the House Ethics Committee, (2) whether Defendant's receipt of the tape from the Martins was so closely tied by knowledge and action to the Martins's illegal disclosure that Defendant obtained the information unlawfully, and (3) 18 U.S.C. § 2511(1)(c) would survive First Amendment scrutiny even if *Bartnicki* fully applied, because the statute is constitutional under the fact-specific balancing test set forth in that opinion.[5]

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[5] As described below, the Court finds that Defendant unlawfully obtained the information on the tape, and therefore the facts of the instant case set it apart from *Bartnicki*. For this reason, the Court does not find it necessary to address the merits of Plaintiff's third argument (*i.e.*, even if *Bartnicki* fully applied, the statute is constitutional under the fact-specific balancing test set forth in that opinion). The Court will address, however, Plaintiff's *Aguilar* argument, as it raises important issues that are worthy of discussion on the merits.

1. Defendant's Status as Then-Ranking Member of the House Ethics Committee

Plaintiff contends that, unlike in *Bartnicki*, finding Defendant liable for violating § 2511(1)(c) survives a First Amendment test here because Defendant's disclosure is governed by the Supreme Court's decision in *United States v. Aguilar*, 515 U.S. 593 (1995). *Aguilar* held that disclosures by certain public officials are not protected by the same stringent First Amendment scrutiny as disclosures by ordinary citizens. *Id.* at 606. In *Aguilar*, a federal judge disclosed information about the existence of a wiretap to the subject of the surveillance, thus violating a federal law. *Id.* His conviction was affirmed under a diminished standard of First Amendment scrutiny because the Supreme Court held that he voluntarily assumed a duty of confidentiality with regard to the information he disclosed. *Id.*

Plaintiff argues that *Aguilar* is indistinguishable from the instant case because the House Ethics Committee Rules (the "Committee Rules") regarding disclosures justify applying a lower standard of First Amendment Protection to Defendant's disclosure.[6] To the contrary, Defendant insists that he must be afforded the same First Amendment protection as any other public citizen because he did not receive the information in his official capacity as a member of the Committee, and that his disclosure was not governed by a pre-existing duty not to disclose similar to that in *Aguilar*. As explained below,

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[6] The Rules of the Committee on Standards of Official Conduct 10(b) [entitled "Committee Records"] (now Rule 12(b)) states: "Members and staff of the Committee shall not disclose to any person or organization outside the Committee, unless authorized by the Committee, any information regarding the Committee's or a subcommittee's investigative, adjudicatory or other proceedings . . . ." Pl.'s SUF Ex. B-7 ("Rules Adopted by the Committee of the House of Representatives (104th Congress, 1995–1996)).

McDermott's argument fails as to his point regarding how and why he received the information, but his argument succeeds as to whether he was under a preexisting duty greater than that required of any citizen.

(a) Whether McDermott Received the Information In His Official Capacity As A Member of the Committee

Defendant argues that

> [b]ecause [he] did not receive the information on the tape from a fellow Committee member, as part of a Committee briefing, or from a witness in a closed Committee hearing, and because lawfully could have received the tape even if he were not a member of Congress, *Aguilar* cannot be used to contradict what *Bartnicki* commands.

Def.'s Reply at 9. Specifically, McDermott artfully pleads that he did not "obtain[] the information in his official capacity as a member of the Ethics Committee. Instead, . . . he received it from private citizens, not from (or through) the Committee. . . . [He] obtained the information from the Martins in his 'unofficial political capacity,' rather than his 'official ethical capacity.'" Def.'s Mot. at 18–19 (internal citations to *Boehner*, 191 F.3d at 486 (Sentelle, J., dissenting)). Such are Defendant's arguments to the Court; however, the cover letter itself and the documents produced by McDermott in discovery show a different version of events. First, the cover letter reads as follows:

January 8, 1997

Committee On Standards of Official Conduct
HT2 Capital
20515–6328

Jim McDermott, Ranking Member

Enclosed in the envelope you will find a tape of a conversation heard December 21, 1996 at about 9:45 a.m. The call was a conference call heard over a scanner. We

felt the information included were [sic] of importance to the committee. We live in the 5th. Congressional District and attempted to give the tape to Congresswoman Karen Thurman. We were advised by her to turn the tape directly over to you. We also understand that we will be granted immunity.

. . . We pray that committee [sic] will consider our sincerity in placing it in your hands.

We will return to our home today.

Thank you for your consideration.

John and Alice Martin
[Address and phone number omitted herein.]

Cover Letter (found at Pl.'s SUF Ex. B-8). Based on the plain text of the cover letter, it is undisputed that the Martins were told to and did seek out McDermott because he was Ranking Member of the House Ethics Committee and because the information on the tape pertained to that Committee's pending investigation of Newt Gingrich.

Second, McDermott, and others acting on his behalf, have solicited funds from people in McDermott's district and elsewhere in order to pay for the legal fees incurred as a result of the instant litigation. The materials sent out as part of this fundraising campaign show that McDermott himself believes he was acting in his official capacity as a member of the Ethics Committee. The following examples demonstrate this, and are numbered as they appear in Exhibit L of Plaintiff's Undisputed Facts:

— Ex. L; M000001 (Fundraising Letter from Def., dated 12/14/2000):

In 1993, when Speaker Tom Foley asked me to chair the House Ethics Committee, I could not have envisioned that six years later, I would be writing this letter to you. But I fell heir to chairing the Committee when it undertook consideration of the Newt Gingrich case.

As that case proceeded, I was sued in federal court by John Boehner. . . .

Throughout this protracted process, my position has rested upon the protections afforded all Americans by the First Amendment. The effort has been extremely costly, and I now find myself in need of your help. . . .

To meet this obligation, I have established the Jim McDermott Legal Expense Trust . . . .

— Ex. L; M000003 (Fundraising Letter from Thomas S. Foley, dated 06/19/2001):

"Jim McDermott has been targeted and attacked [in this lawsuit] by Republicans because of his work on the Ethics Committee."

— Ex. L; M000005 (Fundraising Letter from Andrew L. Stern, International President of Service Employees International Union, dated 08/13/2001):

"Jim [McDermott] was sued in federal court by Congressman John Boehner (R-OH) because of his role in the investigation that led to then-Speaker Newt Gingrich's resignation from Congress."

— Ex. L; M000006 (Fundraising Letter from Def., dated 02/08/2001):

"Thank you for your offer to assist my Legal Expense Trust. The Congress allows it members to establish such trusts to pay legal expenses incurred in connection with official duties or a position in Congress."

— Ex. L; M000027 (Fundraising Letter from Richard A. Gephardt, dated 09/06/2001):

"As a result of performing his duties, [Jim McDermott] has found himself faced with onerous legal expenses in the defense of our First Amendment rights."

— Ex. L; M000035 (Fundraising Solicitation from "Friends for Jim McDermott," undated):

"The Jim McDermott Legal Expense Trust has been created exclusively to defray legal costs that have been

and will be incurred in connection with Congressman McDermott's official duties and position in Congress."

These documents could not make it more clear that Defendant believes he was acting in his official capacity as a member of the Ethics Committee. In 1999, Judge Sentelle wrote the following:

> Appellant and intervenor argue that McDermott can be punished for his disclosure because of his having, in their view, obtained the information at issue in his capacity as a member of the House Ethics Committee. I cannot agree. McDermott did not in fact obtain the information in his official capacity. The felons who communicated it to him were not looking for him to use his official ethical capacity but rather his unofficial political capacity to disseminate their unlawfully obtained information. It may well be the case that had he obtained the same information, for example, by Committee subpoena, he could not have lawfully disclosed it and his disclosure would not be constitutionally protected. Indeed, that is perhaps more likely than not. But those are not the facts before us.

Boehner v. McDermott, 191 F.3d at 485–86 (Sentelle, J., dissenting). Judge Sentelle reached this conclusion, however, without the benefit of the above information that was obtained through discovery. Through his own fundraising materials, McDermott has admitted that he believes otherwise. In this light, and based on the plain text of the cover letter, Defendant's argument that he received the tape from the Martins in his "unofficial political capacity" is without merit.

(b) Whether McDermott Was Under A Pre-existing Duty Not to Disclose

While it is not for the courts to interpret or enforce Congressional rules, Plaintiff argues that *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), permits this Court to take limited judicial cognizance of the

Committee Rules to the extent of determining whether Defendant's disclosure violated any special duty similar to that found in *Aguilar*. Pl.'s Mot. at 15 n.11. To support the alleged rule violation, Plaintiff emphasizes Defendant's admission [through counsel] that he was given the tape because of his position as a ranking member of the House Committee. Pl.'s Opp'n at 9–10 (citing Pl.'s SUF Ex. I, July 17, 1998 Hrg. Tr. at 22:10–11; 15:21–16:5; 24:3). *Rostenkowski* permits the courts to take limited judicial cognizance of the rules of Congress; however, it also makes clear that it is outside the realm of the courts to construe Congressional rules that present significant ambiguities. 59 F.3d at 1312 (holding that where there is "reasonable doubt" as to the application of a Congressional rule, the court "cannot presume to interpret it"). In the case at hand, a significant ambiguity exists as to whether the Committee's non-disclosure rule (*i.e.*, the former Rule 10(b)) applies to unsolicited, illegal information presented outside the Committee by private citizens. Further, the contents of the tape in which both members of Congress and nonmembers privately discuss political responses to a Committee ruling may or may not be "information regarding the Committee's . . . proceedings" within the meaning of the Committee Rule. While the Court has found that the Martins did present their recording to Defendant due to his position on the Committee, it is not apparent that the Martins' decision in that regard materially affects whether the information falls within the scope contemplated by the Committee Rules.

Further, Congress altered the scope of the Ethics Committee non-disclosure rules in the wake of the events of this case by subsequently instituting an oath requiring members to swear not to disclose any information "received in the course of [one's] service with the committee." 143 Cong. Rec. H7544-02 (1997). This subsequent clarification fuels doubt as to whether the Committee Rules as written at the time of Defendant's disclosure in fact prohibited Defendant's disclosure.

Overall, this Court declines to interpret the Committee Rules as they stood at the time to determine whether Defendant's actions violated any special duty of confidentiality imposed on him.

Plaintiff argues in the alternative that even if Defendant's disclosure violated no specific duty under the Committee Rules, the confidentiality duty imposed in *Aguilar* did not derive from formal rules. Plaintiff thus urges that Defendant was under a general Congressional nondisclosure duty that "goes without saying." Pl.'s Mot. at 18. The duty invoked in *Aguilar*, however, was the "universally recognized" duty of confidentiality with regard to communications between judicial colleagues concerning sensitive information. *United States v. Aguilar*, 994 F.2d 609, 616 (9th Cir. 1993), *opinion withdrawn by* 21 F.3d 1475 (9th Cir. 1994) (en banc), *reversed on grounds other than this point*, 515 U.S. 593 (1995); *see also Aguilar*, 515 U.S. at 605–06 (Judge Aguilar was not "simply a member of the general public who happened to lawfully acquire possession of information about the wiretap; he was a Federal District Court Judge who learned of a confidential wiretap application from the judge who had authorized the interception, and who wished to preserve the integrity of the court."). Here, by contrast, Defendant received information from members of the general public unconnected to Congress or to the Committee outside of Committee proceedings. While one would expect the Chairman of the Ethics Committee to handle such information in an ethically judicious manner, the law has not previously recognized a general Congressional duty of non-disclosure and this Court declines to create such a duty here.

(c) Conclusion Regarding Applicability of *Aguilar* to This Case

This Court originally held that *Aguilar* was distinguishable from the instant case since McDermott had "no such independent duty not to disclose

information; the restriction on disclosure derive[d] solely from the federal and state statutes themselves." *Boehner*, 1998 WL 436897, at *6. The Court of Appeals agreed, stating that while McDermott did receive the tape under a duty not to disclose, that duty "arose from a statute — § 2511(1)(c)." *Boehner*, 191 F.3d at 477. Nothing in the vacated court of appeals opinion nor in the Supreme Court's decision in *Bartnicki* suggests expanding the holding in Aguilar to apply to Defendant's disclosure. Indeed, no legal authority has since come to light that would warrant departure from that position. Therefore, while it is clear that McDermott received the information from the Martins in his official political capacity, the Court does not find that he was under an independent preexisting duty greater than that required of any citizen.

2. The Lawfulness of the Manner In Which Defendant Obtained the Information

As described above, this Court has concluded that Defendant's ultimate disclosure of the Martins' tape violated 18 U.S.C. § 2511(1)(c). The Supreme Court noted, however, that whether the First Amendment shields a defendant from liability under that statute substantially depends upon the lawfulness of the manner in which he initially obtained the information. *See Bartnicki*, 532 U.S. at 532 n.19 (noting that the First Amendment protection applied to the disclosure in that case "does not apply to punishing parties for obtaining the relevant information unlawfully"). Where a defendant unlawfully obtains information, neither *Bartnicki* nor any other authority shields against liability for subsequent disclosure.

On Defendant's earlier motion to dismiss, this Court held that Defendant had not unlawfully obtained the tape from the Martins. *Boehner*, 1998 WL 436897, at *4. The Court reasoned that Defendant could not have unlawfully obtained information because his receipt of it was not expressly prohibited by statute. *Id.* (holding that "[b]ecause defendant did not break any laws in taking

possession of the tape, he lawfully obtained that information"). As a result, the Court reluctantly held that Defendant had exploited a loophole. *Id.* As a result, the Court concluded that "neither statute nor caselaw provides substantial basis to conclude that defendant unlawfully obtained the taped conversation." *Id.*

The Court of Appeals, however, specifically found otherwise. In reaching this conclusion, the Court of Appeals assumed all facts as presented by Plaintiff. *Boehner*, 191 F.3d 463, 464 n.1. Both the majority and the concurring Court of Appeals opinions ruled that Defendant had obtained the tape through an "illegal transaction." 191 F.3d at 475–76, 479. As a result, the majority held that "the illegal activity of the Martins, of which McDermott was well aware when he took possession of the tape," took this case outside the Florida Star line of cases that protects lawfully obtained information. *Id.* at 476. The court explained that "[a]gain and again [Defendant] insists that he 'lawfully obtained' the tape. By this he means that he broke no law in taking possession of the tape. But this is hardly certain. . . . By accepting the tape from the Martins, McDermott participated in their illegal conduct." *Id.* at 475–76. The concurring opinion further articulated this reasoning, stating

> [n]ot only was the transaction in which McDermott obtained the tape therefore illegal — albeit only the Martins could be punished for effectuating it — but McDermott knew the transaction was illegal at the time he entered into it. One who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not 'lawfully obtain[ed]' that information in any meaningful sense.

Id. at 479 (Ginsburg, J., concurring) (footnote and internal citation omitted). Overall, both the majority and the concurrence found that because the transaction in which Defendant obtained the tape was illegal and

because he knew it to be so at the time he took possession, his actions and knowledge placed this case outside the *Florida Star* line of cases protecting disclosure of lawfully obtained information. Intermediate scrutiny would therefore apply. *Boehner*, 191 F.3d at 479 (Ginsburg, J., concurring) ("Because McDermott did not in fact lawfully obtain the tape, however, he may be punished under § 2511(1)(c), as he concedes, if the statute as applied to him survives intermediate scrutiny."); *id.* at 480 (Ginsburg, J., concurring) ("[I]f *Florida Star* does not require the application of strict scrutiny in this case, then we should apply at most intermediate scrutiny.")

As a result, the conclusion to be drawn from that court's opinion is that even though 18 U.S.C. § 2511 does not specifically prohibit the receipt of illegally obtained information, Defendant did not lawfully obtain the material if he knew of the illegality of the Martins' disclosure at the time he voluntarily accepted it. The Court of Appeals thus examined the scenario in which a source obtains information illegally and passes it to an intermediary, and that court found that an intermediary's present knowledge of the illegality of a source's disclosure at the time the intermediary accepts it renders the intermediary's obtaining of the information unlawful.

Bartnicki does not disturb that point of law because the Supreme Court merely "accept[ed] respondents' submission" in that case on the assertion that the parties had lawfully obtained access to the intercepted information in that case. 532 U.S. at 525. The defendants' actions in *Bartnicki* did not present a knowing acceptance scenario such as is alleged here. In *Bartnicki*, the first known link in the chain of the illegally intercepted information was defendant Yocum. *Id.* at 519. Yocum obtained the illegally intercepted information by unwittingly retrieving an unsolicited tape anonymously placed in his mailbox. *Id.* The Supreme Court held that Yocum's subsequent disclosure of the illegally intercepted, but publicly valuable, information to

defendant Vopper was therefore protected under the First Amendment. *See id.* at 534. Inductively, then, radio commentator Vopper's receipt of the information was similarly found to be lawful and his disclosure of the information on his radio show was protected. *See id.* Identical reasoning applies to all media defendants who subsequently obtained and disclosed based on Vopper's radio account.

For purposes of this case, the *Bartnicki* ruling in relation to defendant Yocum's actions is extremely relevant. Examining Yocum's actions, *Bartnicki* necessarily stands for the proposition that a defendant who anonymously receives illegally intercepted information without present knowledge of its illegality has obtained it lawfully. *See* 532 U.S. at 525. The vacated Court of Appeals opinion, by contrast, concluded that a defendant who accepts information from a source with present knowledge of source's identity and the illegality of the source's disclosure has himself unlawfully obtained it. *Boehner*, 191 F.3d at 476, 479.

This Court finds no conflict between those independent propositions. The Supreme Court acknowledged this differentiation but expressed no view on it, noting only that "[i]n the *Boehner* case . . . the defendant knew both who was responsible for intercepting the conversation and how they had done it. In the opinion of the majority, the defendant acted unlawfully in accepting the tape in order to provide it to the media." *Bartnicki*, 532 U.S. at 522 n.5 (internal citation omitted). The Supreme Court further emphasized that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* at 535 (footnote omitted). This again distinguishes the stranger's act in *Bartnicki* with the Court of Appeals's reasoning in which a recipient knows of both the identity and the illegal means by which a source has obtained the information. Moreover, the distinction drawn creates sound policy because a recipient's present knowledge of

illegality of a disclosure implicates the choice to condone it by accepting the information or to prevent it by declining to participate. In contrast, punishing a defendant who accepts an anonymous disclosure with no knowledge of the illegality of the disclosure can deter nothing. Consequently, this Court declines to depart from the reasoning in the vacated Court of Appeals opinion to the extent that it remains undisturbed by the holding in *Bartnicki*.

Summary judgment requires the Court to determine from the record before it whether undisputed facts cast this case under the Court of Appeals' reasoning or the *Bartnicki* holding, or whether facts in dispute control that determination. The primary distinction between those scenarios rests on what Defendant knew about the illegality of the information he accepted and when he knew it. In this case, the Martins supplied with their tape a cover letter that introduces themselves and explains their illegal interception. McDermott Dep. at 266; *see also* Cover Letter (Pl.'s SUF Ex. B-8). It is clear that at some point McDermott knew that the tape was illegally obtained. Of course, the crucial question in this case is when did he learn it and, consequently, whether he participated in the illegal conduct of the Martins. If Defendant read the cover letter or the Martins related its relevant contents to him at the time Defendant received the tape, he would have possessed sufficient knowledge of the illegal transaction to have unlawfully obtained the tape as per the Court of Appeals's reasoning. On the other hand, if Defendant learned of the contents of the letter at some later time after taking possession of the tape, the Court of Appeals's reasoning no longer applies and the case more closely resembles *Bartnicki*, wherein

> respondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was

> obtained lawfully, even though the information itself was obtained unlawfully by someone else.

Bartnicki, 532 U.S. at 525.

Defendant maintains only that he has no recollection of reading the cover letter prior to his disclosure of the tape and that the Martins provided no relevant information to him other than their names and the area of their home state in which they lived. McDermott Dep. at 150, 158. Not only does common sense dictate that one who accepts from strangers a package with a short accompanying letter is likely to read the letter, but — as explained below — strong evidence indicates that Defendant knew of the information contained in the letter at the time he assumed possession of the tape. Defendant counters this by asserting that the letter was actually included inside the envelope with the tape, hidden from his view at least until his later review of the materials. Def.'s Opp'n at 11. He claims that

> the letter was sealed inside the accompanying 8-1/2" by 11" packing envelope, making it impossible to charge McDermott with knowledge of its contents when he received the envelope from them. McDermott did not open the envelope until after he left the Martins, and did not notice the cover letter even then, when only the tape fell out. (McDermott Dep. at 150:14–25, 154:14–17, 164:3–5 ("I opened the envelope and dumped it out and there was a tape and put it my [tape player] and listened to it."); *see also id.* at 159:9 (describing the 8-1/2" by 11" packing envelope).)

Id. at 6 (emphasis in original). This assertion that the letter was hidden inside the envelope is totally unsupported by the record, however, and was not specifically claimed by McDermott until his attorneys stated such in Defendant's opposition to Plaintiff's motion for summary judgment. He cites no evidence demonstrating that the letter was "sealed inside" the

envelope as opposed to taped to the outside of it;[7] rather, he argues that "[t]here is no basis for Boehner's assertion that because McDermott does not recall seeing the letter, he necessarily must have read it . . . ." Def.'s Opp'n at 12 n.5. Indeed, his own deposition passages that he cites merely reiterate that he could not recall reading the cover letter.[8] None of his other filings with this Court lend

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[7] Shortly after the topic of the cover letter was raised at Defendant's deposition, a discussion ensued among counsel as to whether the cover letter Defendant turned over in discovery to Plaintiff came from Defendant's files or from some other source. *See generally* McDermott Dep. at 151–153. This distinction was meaningful, Defendant's counsel argued during the deposition, because

> [i]n our search of [Defendant's and Defendant's counsel's] records to produce to [Plaintiff] we found no copy of the letter. Otherwise we would have produced it to you from that source. But we did have a copy we had obtained from the Department of Justice as the fax line [at the top of the document] indicates and we produced that one. . . . But it didn't come from [Defendant's] files.

Id. at 151:19–152:1. The Court infers that this discussion occurred during the deposition to support a future assertion that Defendant never saw the cover letter, but the specific issue as to whether or not Defendant's files contained a copy of the cover letter was not raised in any of Defendant's summary judgment pleadings. The reason that DOJ had the cover letter in the first place, however, is because DOJ received it from the House Ethics Committee on January 13, 1997, which in turn received it that same day from McDermott. *See* Letter from Chief Counsel of Ethics Committee (found at Pl.'s SUF Ex. B-9).

[8] Defendant's deposition at 150:14–25 reads:

> [Q] Do you not recall seeing the cover letter or are you denying — do you have a recollection that there was no cover letter?
>
> [A] No, I can't remember. I can't remember seeing the letter.

support to his claim. For example, McDermott's Answer to the Complaint states that he "slit open the envelope in his office and shook out the Tape. He does not recall seeing the letter." Def.'s Answer at 7. His Declaration of December 16, 2002 does not address the cover letter. In fact, other than the unsupported assertion in his opposition, McDermott has provided no declaration, affidavit, or other evidence indicating that the cover letter was sealed inside the envelope and thus potentially out of his view.

The wording of the cover letter itself, however, indicates that the cover letter was outside the envelope. Specifically, the cover letter provides that "[e]nclosed in the envelope you will find a tape." Pl.'s SUF Ex. B-8 (Cover Letter). Additionally, the January 10, 1997 *New York Times* article published as a result of Defendant's disclosure demonstrates Defendant's knowledge of the tape's illegal origins. That article quotes Defendant as providing identical information as that contained in the letter, and even using similar phraseology. The cover letter provided that the envelope contains "a tape of a conversation heard December 21, 1996 at about 9:45 a.m.

[Q] Okay. And just so I'm clear, you can't remember seeing it on January 8th, when you met with the Martins, correct?

[A] Yes.

[Q] And at any time thereafter, did you see the cover letter?

[A] I have no recollection of seeing a letter.

Similarly, the same deposition at 154:14–19 reads as follows:

[Q] Okay. So you don't recall seeing the cover letter at any time prior to January 13th, just so I'm clear?

[A] Prior to January 13th.

[Q] 1997.

[A] No, I don't.

The call was a conference call heard over a scanner." *Id.* In comparison, the *New York Times* article states that

> [t]he Congressman said the tape was given to him on Wednesday by a couple who said they were from northern Florida. He quoted them as saying it had been recorded off a radio scanner, suggesting that one participant was using a cellular telephone. They said it was recorded about 9:45 a.m. on Dec. 21.

Pl.'s Ex. B-2. Defendant can explain neither the article quoting him as having knowledge of the tape's origins nor the remarkable similarity between the quotes attributed to him and the cover letter he purports not to remember reading. McDermott Dep. at 156–57.

Further, Defendant's conduct surrounding the publishing of this article also indicates that he was aware of the tape's illegal origins. By his own estimate, Defendant returned to his office and listened to the tape at approximately 7:00 p.m. on January 8, 1997. *See* McDermott Dep. at 162–64. Shortly thereafter that same night, Defendant called New York Times reporter Adam Clymer and invited him to Defendant's office to listen to the tape. *See id.* at 183–84. Clymer then wrote in the newspaper article that "a transcript [of the tape] was made available by a Democratic Congressman hostile to Mr. Gingrich who insisted that he not be identified further." Adam Clymer, *Gingrich is Heard Urging Tactics in Ethics Case*, N.Y. Times, Jan. 10, 1997, at A1, A20 (found at Pl.'s SUF Ex. B-2). McDermott continued to deny his role in the release of the tape when he spoke with reporters on January 10, 1997. *See* McDermott Dep. at 225–26. In fact, he maintained these denials until the Martins held a news conference on January 13, 1997 and identified him by name as the Democratic Congressman to whom they had given the tape. Def.'s Answer at 10. Consequently, on January 13, 1997, Defendant was forced to finally admit his true role in the tape's disclosure. Compl. ¶ 24; Answer at 10 (On "[t]hat same

day, after the Martin's news conference, defendant McDermott delivered a copy of the tape to the House Ethics Committee. Rep. Johnson, Chair of the Committee, immediately sent the tape to the United States Department of Justice. Defendant McDermott resigned from the Ethics Committee that same day."). Defendant's action of immediately inviting Clymer to listen to the tape is uncontested, and his subsequent attempts in the days following to conceal this disclosure reflects that McDermott knew he had obtained the tape improperly.

To counter all of these facts, Defendant relies primarily on faulty recollection as to crucial questions regarding what he knew and when he knew it. As to whether or not he read the cover letter, Defendant asserted only that "if I read it, I don't remember it." *Id.* at 150. Confronted with the newspaper article indicating that he told Clymer of the Martins' method of illegal intercept, Defendant responded, "I wouldn't say I didn't say it. I just don't recall it." *Id.* at 156. As to the portion of Clymer's article indicating that Defendant knew of the tape's illegal origin, Defendant explained that "[he does not] know how that got there [in the newspaper article] because [he does not] remember ever reading that." *Id.* at 157. Finally, when asked whether, as the newspaper article implies, the Martins related to him the manner in which they illegally obtained the tape, Defendant replied only that he does "not remember one way or another." *Id.*

Even though the Court has "assume[d] the truth of all statements proffered by the party [*i.e.*, McDermott] opposing summary judgment," *Greene v. Dalton*, 164 F.3d 671, 674 (D.C. Cir. 1999), all that is gained from this is an understanding that McDermott claims he cannot remember whether or not he saw the cover letter. Defendant's repeated reliance on faulty memory in the face of direct contrary evidence fails to create a genuine issue of material fact. *See, e.g., Federal Election Comm'n v. Toledano*, 317 F.3d 939, 950 (9th Cir. 2002) ([F]ailure to remember and lack of knowledge are not sufficient to

create a genuine dispute."); *FDIC v. Natl'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 205 F.3d 66, 75 (2d Cir. 2000) ("[V]ague denials and memory memory lapses . . . do not create genuine issues of material fact.")

The case at hand is distinguishable from *Bartnicki* on a very important point: In *Bartnicki*, defendant "Yocum . . . testified that he had found the tape in his mailbox shortly after the interception" and then later delivered the tape to radio commentator Vopper who, along with "other individuals and media representatives," published the contents of the conversation found on the tape. 532 U.S. at 519. In the instant case, however, McDermott actively accepted the tape from the people who had illegally recorded it. McDermott knew not only that he was receiving a tape from two strangers from Florida, *see* McDermott Dep. at 158, 171–72, but — as detailed in their cover letter — who those people were and how they had made the recording. In *Bartnicki*, the Supreme Court noted the importance of this when it wrote that "[i]n the Boehner case, as in this suit, a conversation over a car cell phone was intercepted, but in that case the defendant knew both who was responsible for intercepting the conversation and how they had done it." 532 U.S. at 522 n.5 (citation omitted). Moreover, McDermott played an essential role in the disclosure for which the Martins pleaded guilty and were fined. This is evident because the Martins first "attempted to give the tape to Congresswoman Karen Thurman [but] were advised by her to turn the tape directly over to [McDermott.]" Cover Letter (found at Pl.'s SUF Ex. B-8). Put simply, the Martins could not have completed their disclosure without the active assistance of McDermott, who joined in the Martin's violation of 18 U.S.C. § 2511(1)(c) by knowingly joining in the Martins's illegal actions.

In sum, all of the evidence is uncontradicted that at the time he took possession of the tape, Defendant was aware of the cover letter and, more importantly, knew of the Martin's illegal activity. In light of the discovery and

evidence now available to this Court at the summary judgment phase of the case, it is also uncontradicted that McDermott knew he was receiving a tape recording that had been illegally obtained. As a result, the Court finds that no genuine issue of fact arises as to Defendant's knowledge of the illegal transaction in which he was participating by accepting the tape from the Martins. The Court of Appeals's reasoning that flowed from this assertion thus continues to apply, and Defendant's claimed First Amendment defense fails in light of the applicable intermediate scrutiny. Therefore, Plaintiff is entitled to judgment as a matter of law with respect to Defendant's disclosure in violation of 18 U.S.C. § 2511(1)(c).

V. CONCLUSION

For the reasons stated above, the Court finds that the Florida statute is inapplicable and so Plaintiff's Motion for Summary Judgment is denied in part and Defendant's Motion for Summary Judgment is granted in part. As to the federal statute, however, the Court finds that because Defendant McDermott participated in an illegal transaction when he accepted the tape from the Martins, he is without First Amendment protection and Plaintiff Boehner is therefore entitled to judgment as a matter of law. To this extent, Plaintiff's Motion for Summary Judgment is granted in part and Defendant's Motion for Summary Judgment is denied in part.

Since the Court has found that Plaintiff is entitled to judgment as a matter of law with respect to Defendant's disclosure in violation of 18 U.S.C. § 2511(1)(c), the remaining question is one of damages. As discussed in the Order that accompanies this Opinion, the Court would benefit from limited additional briefing as to whether the Court should award Plaintiff any attorney's fees and costs, and whether an award of punitive damages is appropriate.

August 20, 2004

/s/
Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN A. BOEHNER,

Plaintiff,

v.

JAMES A. McDERMOTT,

Defendant.

Civ. No. 98-0594 (TFH)

ORDER

Pending before the Court are Plaintiff and Defendant's cross motions for summary judgment. For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendant's Motion for Summary Judgment [# 67] is **GRANTED IN PART and DENIED IN PART**, and that Plaintiff's Motion for Summary Judgment [# 68] is **GRANTED IN PART and DENIED IN PART**. It is further

ORDERED that a status hearing shall occur on Thursday, September 16, 2004 at 3:00 p.m. to discuss the issues of damages, fees, and costs. The parties may each file a concise statement of their positions by 5:00 p.m. on Friday, September 10, 2004.

August 20, 2004

/s/
Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN A. BOEHNER,

Plaintiff,

v.

JAMES A. McDERMOTT,

Defendant.

Civ. No. 98-0594 (TFH)

MEMORANDUM OPINION

Upon consideration of the oral argument at the hearing on October 7, 2004, Plaintiff John A. Boehner's Statement of Position on Damages, Fees, and Costs ("Pl.'s SPD"), and Defendant James A. McDermott's Statement Regarding Punitive Damages, Attorney's Fees, and Costs ("Def.'s SPD"), and the entire record herein, the Court hereby awards Plaintiff $10,000 in statutory damages, $50,000 in punitive damages, and a reasonable attorney's fee and other litigation costs reasonably incurred.

I. BACKGROUND

This case results from a disclosure made by Defendant James McDermott to members of the press concerning an illegal intercept of a conference call between Plaintiff John Boehner and several House Republican leaders. McDermott is a Democratic member of the House of Representatives, representing the Seventh District of Washington, and Boehner is a Republican member of the House of Representatives, representing the Eighth District of Ohio. The subject of the conversation was a discussion of potential responses to the House Ethics Committee Probe of then-House Speaker Newt Gingrich. Boehner Dep. at 15–16.

Boehner participated in the conference call on a cellular phone inside his car while parked at a Waffle

House restaurant in northern Florida. Boehner Dep. at 9. The conference call was electronically intercepted by a Florida couple, Alice and John Martin, using a radio scanner. Def.'s Ans. ¶ 8. The Martins recorded the call and then delivered that tape to the Gainesville, Florida office of Democratic Representative Karen Thurman, who at the time represented the Fifth District of Florida. *See id.* ¶ 10. Representative Thurman advised the Martins to deliver the tape to Defendant, who was then a ranking Democratic member of the House Committee on Standards of Official Conduct ("House Ethics Committee"). *See* Cover letter of 1/8/1997 that the Martins presented to Defendant along with the tape (hereinafter "Cover Letter") (found at Pl.'s Statement of Undisputed Facts ("SUF") Ex. B-8).

On January 8, 1997, the Martins personally delivered a copy of the tape enclosed in an envelope to McDermott in the anteroom of the House Ethics Committee in Washington, D.C. McDermott Dep. at 157–58. Along with the tape was a letter explaining that the tape contained "a conference call heard over a scanner," and that "[the Martins] understand that [the Martins] will be granted immunity." Pl.'s SUF Ex. B-8 (Cover Letter). Before this encounter, McDermott claims to have had no knowledge of either the Martins or the tape. *See* McDermott Decl. ¶ 3 (found at Def.'s Opp'n Ex. F). McDermott later that evening returned to his office, opened the envelope, and listened to the tape. McDermott Dep. at 162. He maintains, however, that he has no recollection of seeing the accompanying letter at any time prior to his disclosure. *Id.* at 150.

That evening and the following day, McDermott disclosed the tape to the *New York Times* and the *Atlanta Journal-Constitution*. *Id.* at 174–75. The *New York Times* published a story regarding the contents of the disclosed tape on the front page of its January 10, 1997 edition. Adam Clymer, *Gingrich is Heard Urging Tactics in Ethics Case*, N.Y. Times, Jan. 10, 1997, at A1 (found at Pl.'s SUF Ex. B-2). The article references only an

anonymous Congressional source, but McDermott acknowledges that he was the source. McDermott Dep. at 220–21. At a press conference on January 13, 1997, the Martins declared that they were responsible for intercepting Plaintiff's conversation and identified McDermott as the person to whom they delivered a copy of the conversation. Def.'s Ans. ¶ 24. Only after the Martins' press conference did McDermott deliver copies of the conversation to other members of the House Ethics Committee. *Id.* ¶ 25. McDermott resigned from the committee the same day. *Id.*

II. PROCEDURAL HISTORY

Plaintiff filed a complaint on March 9, 1998 alleging that Defendant knowingly disclosed an unlawfully intercepted communication in violation of the federal wiretapping statue, *18 U.S.C. §2511(1)(c)*,[1] and a Florida wiretapping statue, *Fla. Stat. § 934.03(1)(c)*.[2] Plaintiff sought recovery for damages under *18 U.S.C. § 2520* and *Fla. Stat. § 934.10* that authorize private actions to recover for violations of the federal and state wiretapping statutes, respectively. This Court granted Defendant's motion to dismiss, finding that the First Amendment protected the

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[1] 18 U.S.C. § 2511 provides, in pertinent part, that (1) Except as otherwise specifically provided in this chapter any person who-

. . . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

. . . .

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

[2] *Fla. Stat. § 934.03(1)(c)* provides substantively identical language as *18 U.S.C. § 2511(1)(c)*.

disclosure of lawfully obtained information. *Boehner v. McDermott*, No. CIV. 98-594, *1998 WL 436897, *7 (*D.D.C. July 28, 1998), *rev'd, 191 F.3d 463 (D.C. Cir. 1999).* The United States Court of Appeals for the District of Columbia reversed this Court by distinguishing McDermott's conduct from the controlling precedent in *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) ("If a newspaper lawfully obtains truthful information about a matter of public significance, then [the government] may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.") (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979))). *See Boehner v. McDermott*, 191 F.3d 463, 470–76 (D.C. Cir. 1999), vacated by 532 U.S. 1050 (2001). The Court of Appeals found that the federal and state wiretapping statutes were not unconstitutional as applied to McDermott. *Boehner*, 191 F.3d at 478. The Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case in light of its decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *McDermott v. Boehner*, 532 U.S. 1050 (2001). On remand from the Supreme Court, the Court of Appeals reversed this Court's dismissal of the case and remanded, stating "[w]e also conclude that we would benefit from having the district court pass upon the arguments that have taken on new-found importance after *Bartnicki*." *Boehner v. McDermott*, 22 Fed. Appx. 16, No. 98-7156, 2001 WL 1699420 (D.C. Cir. 2001).

On February 22, 2002, Plaintiff amended his complaint to conform to *Bartnicki*, in light of the Court of Appeals suggestion on remand that it believed "the constitutional issues may more readily be decided if Boehner is given an opportunity to amend his complaint, which he is free to do under FRCP 15(a) because McDermott has not yet filed an answer to the complaint." *Id.* Defendant filed his Answer on April 12, 2002, and amended his answer on December 2, 2002.

Plaintiff filed a motion for summary judgment on Dec. 16, 2002. In that motion, Plaintiff claimed that Defendant's knowledge that the tape was illegally intercepted and his subsequent disclosure of the tape to members of the press "triggers liability for both statutory and punitive damages." Pl.'s Mot. at 5. Defendant also filed a motion for summary judgment on Dec. 16, 2002, asserting that because the facts in the instant case are indistinguishable from *Bartnicki*, his disclosure was protected by the First Amendment. Def.'s Mot. at 12–13. Defendant also claims that the Florida statute does not apply to a disclosure that occurred entirely outside of Florida. *Id.* at 12. In its August 20, 2004 Memorandum Opinion and Order, this Court found that the Florida statute was inapplicable and therefore denied Plaintiff's motion for summary judgment in part and granted Defendant's motion for summary judgment in part. Mem. Op. at 35. As to the federal statute, however, the Court found that because Defendant participated in an illegal transaction when he accepted the tape from the Martins, he was without First Amendment protection and Plaintiff was therefore entitled to judgment as a matter of law. To this extent, Plaintiff's motion for summary judgment was granted in part and Defendant's motion for summary judgment was denied in part. *Id.*

III. DAMAGES

Since the Court has found that Plaintiff is entitled to judgment as a matter of law with respect to Defendant's disclosure in violation of 18 U.S.C. § 2511(1)(c), the remaining question is one of damages. Under the remedies provision of the federal wiretapping statute, courts have the broad authority to award such relief "as may be appropriate." 18 U.S.C. § 2520(a).[3] Plaintiff

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[3] 18 U.S.C. § 2520 provides, in relevant part:

(a) In general. -- Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used

argues that he should be awarded his attorney's fees and costs, and punitive damages of at least $100,000, in addition to statutory damages of $10,000. Defendant urges the Court not to award Plaintiff any type of relief.

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in violation of this chapter may in a civil action recover from the person or entity, other than the United

States, which engaged in that violation such relief as may be appropriate.

(b) Relief. -- In an action under this section, appropriate relief includes-

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages --

. . . .

(2) In any other action under this section, the court may assess as damages whichever is the greater of-

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

IV. DISCUSSION

A. Attorney's Fees and Litigation Costs

The remedies section of the federal wiretapping statute provides for the recovery of such relief as may be appropriate for a violation of the statute. 18 U.S.C. § 520(a). The statute then defines "appropriate relief" as including "a reasonable attorney's fee and other litigation costs reasonably incurred." *Id.* at § 2520(b)(3). Plaintiff is entitled to such an award in this case.

Plaintiff argues that the award of attorney's fees to a prevailing plaintiff is mandatory under the statute. Pl.' SPD at 3. Plaintiff supports his position by directing the Court to a plain reading of the statutory language according to basic canons of statutory construction. *Id.* at 2-5. The statute defines reasonable fees and costs as "appropriate" relief without further qualification. 18 U.S.C. § 2520(b)(3). By contrast, the other examples of "appropriate relief" enumerated by the statute are further qualified by language indicating they should only be awarded "as may be appropriate" or "in appropriate cases." *Id.* at § 2520(b)(1-2). Plaintiff argues that in order to give meaning to this distinction in the statutory language, as well as to prevent any redundancy in its reading, the provision must be interpreted as creating a mandatory award of attorney's fees and costs, while leaving the other types of relief to the discretion of the court to award on a case by case basis. Pl.'s SPD at 3. Further, Plaintiff argues that the Fourth Circuit has held that an attorney's fee award is mandatory under the Act. *See Abraham v. County of Greenville, SC*, 237 F.3d 386, 393 (4th Cir. 2001).

Defendant contends that under a plain reading of the statute, courts are given the discretion to decline to award damages of any type, including attorney's fees and costs. Def.'s SPD at 2. Defendant cites two Eighth Circuit cases for the proposition that the fee award is discretionary. *See Morford v. City of Omaha*, 98 F.3d 398, 401 (8th Cir. 1996) (affirming denial of damages,

fees, and costs); *Reynolds v. Spears*, 93 F.3d 428, 436 (8th Cir. 1996) ("We hold that the District Court did not err in holding that attorney fees and costs were not 'appropriate relief' in this case."(quoting district court opinion)). Defendant also cites *Shaver v. Shaver*, which found that "the plain meaning of the word 'may' as used in § 2520(a) gives [the court] discretion not to award costs and attorney's fees," 799 F. Supp. 576, 581 (E.D.N.C. 1992). Plaintiff argues that *Shaver* was overruled by the Fourth Circuit's subsequent holding that a "prevailing party is *entitled* to reasonable attorneys' fees under the Act." *Abraham*, 237 F.3d at 393 (emphasis added). Neither Plaintiff nor Defendant has pointed the Court to any authority in this circuit that explores the issue of whether an attorney's fee award is mandatory or to be left to the discretion of the trial court.

Even if the award of attorney's fees and costs is not mandatory under the remedies provision of the federal wiretapping statute, such relief is certainly at least routinely awarded by courts. Indeed, Plaintiff cites a "legion" of cases that have done so.[4] Pl.'s SPD at 3.

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[4] *E.g.*, *Abraham*, 237 F.3d at 393; *Desilets v. Wal-Mart Stores*, 171 F.3d 711, 717 (1st Cir. 1999); *Andrews v. Mullens*, 124 F.3d 210 (Table), 1997 WL 572198, *2 (9th Cir. 1997); *Williams v. Poulos*, 54 F.3d 764 (Table), 1995 WL 281451 (1st Cir. May 12, 1995); *Heggy v. Heggy*, 944 F.2d 1537, 1540-41 (10th Cir. 1991); *DirecTV v. Hedger*, 322 F. Supp. 2d 879, 883 (W.D. Mich. 2004); *Schmidt v. Devino*, 206 F. Supp. 2d 310, 314-15 (D. Conn. 2001); *Hilt v. Hurd*, 2001 WL 1517041, *3 (W.D. Va. Nov. 21, 2001); *Gaubert v. Gaubert*, 1999 WL 10384, *2 (E.D. La. Jan. 7, 1999); *Smoot v. United Transp. Union*, 1998 WL 689878 (N.D. Ohio Aug. 7, 1998), *aff'd in part & rev'd in part on other grounds*, 246 F.3d 633 (6th Cir. 2000); *Romano v. Terdik*, 939 F. Supp. 144, 150 (D. Conn. 1996); *Menda Biton v. Menda*, 812 F. Supp. 283, 28586 (D.P.R. 1993); *Deal v. Spears*, 780 F. Supp. 618, 625 (W.D. Ark. 1991), *aff'd*, 980 F.2d 1153 (8th Cir. 1992).

Whether or not the award of a reasonable attorney's fee and costs is mandatory under the federal wiretapping statute need not be decided here. In the instant case, such an award is appropriate. The purpose of the attorney's fee award is to encourage private litigation, as it is the most viable means of enforcing the statute, and to vindicate the right of the prevailing plaintiff to bring the lawsuit.[5]

Defendant puts forward several arguments as to why Plaintiff should not be awarded attorney's fees and costs: (1) Defendant had a good faith belief that his actions were protected by the First Amendment; (2) Defendant's conduct was limited in that his only role was to disclose the tape to the media; (3) Plaintiff has suffered no loss from the disclosure; (4) Plaintiff actually sought to benefit from the disclosure by identifying himself as one of the participants on the tape; and (5) the case was close on the merits. Def.'s SPD at 1-2. However, these arguments address Defendant's culpability and are relevant to the issues of compensatory and punitive damages, not attorney's fees, the purpose of which is neither to address Plaintiff's actual loss nor punish Defendant. As stated earlier, the purpose of awarding attorney's fees is to encourage private enforcement of the statute's prohibitions. Defendant has not articulated any reason why this purpose would not be served by an award of

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[5] In reference to Congress' provision of fee awards for claims under the Civil Rights Act of 1964, the Supreme Court has explained that the provision was meant to encourage lawsuits because, "it was evident that enforcement [of the statute] would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401 (1968) (footnote omitted). The same reasoning applies to attorney's fee awards under the federal wiretapping statute.

attorney's fees and costs in this case.[6] Plaintiff shall recover a reasonable attorney's fee and other litigation costs reasonably incurred.

B. Determination of Attorney's Fees and Costs

The amount of attorney's fees and costs that Plaintiff is entitled to recover shall be established through post-judgment proceedings. Fed. R. Civ. P. 54(d)(2). The determination of attorneys' fees shall proceed in accordance with Local Civil Rule 54.2. The determination of the fee amount shall be held in abeyance pending the outcome of any appeal on liability by Defendant. LCvR 54.2(b).

C. Statutory Damages

Plaintiff shall be awarded statutory damages of $10,000. The remedies provision of the federal wiretapping statute states that in an action such as the instant case, the Court "may assess as damages whichever is the greater of--(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000." 18 U.S.C. § 2520(c)(2). Plaintiff requests the $10,000 in liquidated damages

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[6] The cases Defendant cites in which plaintiffs were denied fee awards are all distinguished from the instant case. *See Morford*, 98 F.3d at 401 (affirming denial of fees and costs given plaintiff's lack of success on her claim in that she had been denied statutory and punitive damages even though a jury had found that defendant violated the statute); *Reynolds*, 93 F.3d at 436 (affirming denial of fees and costs where litigation was conducted by essentially the same counsel as were involved in a favorable judgment one month earlier and such piecemeal litigation could have been easily avoided); *Shaver*, 799 F. Supp. at 581 (denying fees and costs where defendant was judgment-proof). In the instant case, Plaintiff has been successful on his claim, the litigation is not duplicative, and Defendant is not judgment-proof

provided by the statute in lieu of actual damages. Pl.'s SPD at 8.

The Sixth Circuit has laid out a framework for determining a proper award under 18 U.S.C. § 2520(c)(2) that is useful here:

> (1) The court should first determine the amount of actual damages to the plaintiff plus the profits derived by the violator, if any. *See* 18 U.S.C. § 2520(c)(2)(A).
>
> (2) The court should next ascertain the number of days that the statute was violated, and multiply by $100. *See* 18 U.S.C. § 2520(c)(2)(B).
>
> (3) The court should then tentatively award the plaintiff the greater of the above two amounts, unless each is less than $10,000, in which case $10,000 is to be the presumed award. *See id.*
>
> (4) Finally, the court should exercise its discretion to determine whether the plaintiff should receive any damages at all in the case before it. *See* 18 U.S.C. § 2520(c)(2).

Dorris v. Absher, 179 F.3d 420, 430 (6th Cir. 1999). First, in the instant case, there has been no evidence as to the amount of actual damages to Plaintiff or profits derived by Defendant, if any. Second, the violation occurred over no more than two days.[7] Because there is no evidence of actual damages and only $200 in per diem damages at most, and because each of these amounts is less than $10,000, the latter figure is the proper sum to award Plaintiff.

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7 Arguably, since there were two distinct disclosures made on two separate days to separate newspapers, the violation could be construed as occurring over two days. *See* McDermott Dep. at 174-75.

As was the case with the award of fees and costs, the parties again argue over whether the imposition of statutory damages is mandatory or discretionary under the remedies provision of the federal wiretapping statute.[8] Like attorney's fees, statutory damages are routinely awarded if not mandatory under the statute. *See generally* cases cited in note 4, *supra*. Again, whether or not statutory damages are discretionary need not be decided here, since the Court finds that statutory damages are appropriate in this case.

Defendant argues that statutory damages are inappropriate because there has been no evidence of financial gain to him or loss to Plaintiff, and because Defendant's actions were motivated by a good faith belief that he was acting in the public interest and under First Amendment protection. Def.'s Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Opp'n") at 32-33. Plaintiff correctly points out that the purpose of statutory damages is to provide for recovery without a specific showing of damages, in recognition of the fact that prohibited invasions of privacy are inherently damaging. Pl.'s Reply at 18. Plaintiff also argues that Defendant cannot avoid damages by raising an unsuccessful First Amendment defense, especially given that Defendant made the

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[8] While the circuits have split over this issue, it does appear that the majority of federal courts interpreting the remedies section of the federal wiretapping statute have found that district courts have the discretion to refuse to award damages in an appropriate situation. *See Absher*, 179 F. at 429-30; *Reynolds*, 93 F.3d at 435; *Nalley v. Nalley*, 53 F.3d 649, 653 (4th Cir. 1995); *Schmidt v. Devino*, 206 F. Supp.2d 301, 306-07 (D. Conn. 2001); *Goodspeed v. Harman*, 39 F. Supp.2d 787, 791 (N.D. Tex. 1999); *Romero v. Terdik*, 939 F. Supp. 144, 149 (D. Conn. 1996); *Shaver*, 799 F. Supp. at 580; but *see Rodgers v. Wood*, 910 F.2d 444, 448 (7th Cir. 1990) (determining, in a split decision, that Congress did not intend to grant discretion to a trial court to refuse to award statutory damages).

prohibited disclosure without first researching the legality of his actions. *Id.* at 20.

Defendant relies heavily on the *Reynolds* decision, and attempts to align himself with the defendant in that case, arguing that like the defendant in *Reynolds*, he "had an understandable motivation in trying to expose what he believed to be wrongful conduct by others." Def.'s Opp'n at 32. However, it was not the defendant's motivation, but his good faith belief in the legality of his conduct that was the court's focus in that case. *Reynolds*, 93 F.3d at 436. In that case, the defendant tapped the phone line in his own store in an attempt to uncover suspected misconduct by his employees after having been incorrectly advised by a law enforcement official that tapping one's own phone line would be legal. *Id.* In the instant case, Defendant did not consult any authority on the legality of his disclosures prior to making them. Additionally, he does not argue that he thought the disclosures were permissible under the federal wiretapping statute, but that he believed the statute was unconstitutional as applied to him. *See* Def.'s SPD at 3-7. Defendant simply does not start out on the same innocent footing as the *Reynolds* defendant.

Further, there were several other circumstances in *Reynolds* that mitigated against the imposition of statutory damages, 93 F.3d at 436. First, there was no evidence of widespread disclosure or use of the plaintiffs' intercepted conversations in that case, unlike here, where the disclosure was made to two major newspapers and disseminated nationally. *See id.* Second, the defendants in *Reynolds* had already received substantial civil penalties for the same conduct in a previous litigation, unlike here, where Defendant is only exposed to liability for damages based on his conduct in the instant case. *See id.* Finally, in *Reynolds*, the court was also persuaded by the financial circumstances of the defendants, who were elderly and retired with a fixed income. *Id.* Here, Defendant has made no such claim of impecuniousness.

The remaining cases cited by Defendant in which statutory damages were denied are domestic relations cases that involved circumstances that were similar to those in *Reynolds*, but are not present here. *See Culbertson v. Culbertson*, 143 F.3d 825, 827 (4th Cir. 1998) (relying on "de minimis" violation); *Nalley*, 53 F.3d at 654-55 (relying on "de minimis" violation in that defendant disclosed anonymously delivered tape only to relevant family members and her attorney); *Shaver*, 799 F. Supp. at 580 (relying on factors of "de minimis" violation given defendant's good faith belief in the legality of her actions in tapping her own phone line, and financial circumstances of the defendant).

In the instant case, where Defendant knowingly participated in an illegal transaction in accepting the tape, subsequently caused the intercepted conversation to be widely disseminated, and is not under any financial circumstances that would make an award futile, the award of statutory damages is appropriate, and the Plaintiff is entitled to recover $10,000 in statutory damages in this case.

D. Punitive Damages

The Court finds that an award of punitive damages in the amount of $50,000 is appropriate given Defendant's outrageous conduct in this case.

In a proceeding under the federal wiretapping statute, in order to receive punitive damages, the plaintiff must "'show that defendants acted wantonly, recklessly, or maliciously.'" *Quigley v. Rosenthal*, 327 F.3d 1044, 1068 (10th Cir. 2003) (citing cases), *cert. denied*, 124 S. Ct. 1507 (2004), *accord Smith v. Wade*, 461 U.S. 30, 56 (1983); *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1239 (D.C. Cir. 1997). Both Plaintiff and Defendant agree that this is the appropriate standard for determining whether punitive damages are appropriate. *See* Pl.'s SPD at 9; Def.'s SPD at 3. Plaintiff argues that Defendant's actions were both malicious and reckless. Pl.'s SPD at 9. Defendant argues that an award of

punitive damages is inappropriate because his conduct was limited in scope in that his only role was to share the tape with the news media, because he honestly believed that he was acting in the public interest by exposing official misconduct, and because the case was close on the merits.[9] Def.'s SPD at 1-2.

The Court finds that Defendant's conduct was malicious in that he intentionally disclosed the tape to the national media in an attempt to politically harm the participants through an invasion of their privacy. Defendant knowingly participated in an illegal transaction when he accepted the tape from the Martins. Mem. Op. at 34. He then intentionally disclosed the Martins' tape to major newspapers to be disseminated nationally. McDermott Dep. at 174-75. Defendant's argument that he is less culpable because his role was limited to the tape's disclosure is disingenuous. It was precisely the disclosure to the national media and resulting widespread dissemination of the conversation that was the greatest invasion of Plaintiff's privacy. *See Bartnicki*, 532 U.S. at 533 ("[T]he disclosure of the contents of a private conversation can be an even greater intrusion of privacy than the interception itself.").

Further, despite his assertions to the contrary, the Court finds that Defendant's motives were not benign. Defendant's intention was to embarrass and politically

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[9] Defendant's remaining two arguments as to why punitive damages are inappropriate (because no wrongful gain or loss resulted from the disclosure and because Plaintiff brought the public exposure on himself) can be disposed of summarily as they miss the point of punitive damages, which is not to compensate the plaintiff for actual damages suffered or reflect the plaintiff's relative culpability. The purpose of a punitive damages award is to punish and deter illegal conduct, and to exact retribution on behalf of society for the violation of its laws. *See e.g. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

harm the individuals overheard on the tape, as evidenced by the Adam Clymer article that initially reported on the tape. *See* Pl.'s SUF Ex. B-2. The article stated that Defendant indicated to Clymer that his disclosure was motivated by hostility toward Newt Gingrich, one of the intercepted conversation's participants. *Id.* Defendant's political motivations are further demonstrated by several of the fundraising materials he distributed touting the disclosure, which depict Mr. Gingrich as "red-handed and red-faced." Pl.'s SUF Ex. L, at M 000014-15. Defendant's argument that he was acting in the public interest by exposing official misconduct is unsupported by the evidence. The facts in this case reveal that Defendant could not have intended to expose misconduct, since he there is no evidence that he was aware of any at the time he made the disclosure. *See* Pl.'s SPD at 11. Judge Sentelle agreed, stating:

> He obtained these communications not for the purpose of disclosing the felonies or assisting in the enforcement of law, but solely for the purpose of using the contents of the communications in the pursuit of the politics of personal destruction. To compound the wrong, this was not just any congressman, but the co-chair of the House Ethics Committee. In other words, a public official charged with the oversight of the ethics of his colleagues willfully dealt with felons and knowingly received unlawfully obtained evidence on the chance that he might be able to use something contained therein to embarrass one of the colleagues whose ethics he was charged with policing.

Boehner v. McDermott, 191 F.3d at 481 (Sentelle, J. dissenting). Defendant's willful and knowing misconduct rises to the level of malice in this case.

Additionally, Plaintiff has shown that Defendant acted recklessly. Plaintiff argues that Defendant's conduct was reckless in that he acted without consulting

any authority on the legality of disclosing the tape, instead relying solely on his own "uninformed guesses" that he was shielded by the First Amendment. Pl.'s SPD at 13. Defendant maintains that he acted under a good faith belief that his disclosure was protected speech. Def.'s SPD at 3. Evidence that a defendant believed he was acting lawfully is one factor to consider in determining whether he acted with the sufficient state of mind to make the award of punitive damages appropriate. *See Quigley*, 327 F.3d at 1070. In *Quigley*, an award of $7.5 million in punitive damages was affirmed based on circumstances similar to the instant case. *Id.* at 1068-71. The defendants in *Quigley*, like Defendant McDermott in this case, disclosed illegally intercepted conversations in an attempt to portray the plaintiffs in a negative light. *Id.* at 1044. Additionally, the court refused to credit the defendants' asserted good faith belief in the legality of their conduct. The court found that had the defendants, who were lawyers, researched the issue, they would have discovered that their intended use of the calls was illegal. Their failure to do so was reckless and punitive damages were warranted. *Id.* at 1070.

As in *Quigley*, Defendant's asserted good faith belief in the legality of his conduct cannot be credited. First, he knowingly participated in an illegal transaction by accepting the tape from the Martins. Second, his position is not that he did not know that his disclosure violated the federal wiretapping statute, but that he believed that by cloaking himself in the First Amendment, he essentially had an affirmative defense to the violation.[10]

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[10] Defendant's asserted corollary to this argument that punitive damages are inappropriate because the case was close on the merits of this issue is wrong. The fact that this case turned out to be close on the merits would only be relevant if Defendant had attempted to discern the constitutionality issue prior to his disclosures, and came to the incorrect conclusion

In addition to this notion being less than credible,[11] Defendant's reliance upon it without consulting any legal authority whatsoever was reckless.

Since Plaintiff has shown that Defendant's actions were both malicious and reckless, an award of punitive damages is appropriate in this case, and Plaintiff shall be awarded $50,000.

V. CONCLUSION

For the reasons stated above, the Court finds that an award of both statutory and punitive damages is appropriate in this case. Plaintiff shall be awarded statutory damages in the amount of $10,000, and punitive damages in the amount of $50,000. Further, Plaintiff shall be awarded his reasonable attorney's fees and other litigation costs reasonably incurred. As discussed in the Order that accompanies this Opinion, the amount of attorney's fees and costs that Plaintiff is entitled to recover shall be established through post-judgment proceedings. Fed. R. Civ. P. 54(d)(2). The determination of attorneys' fees shall proceed in

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that such disclosures would be protected. The evidence reveals that Defendant made no such effort.

[11] As Plaintiff points out, this belief would require a United States Congressman to assume that a statute enacted by Congress is unconstitutional. Pl.'s SPD at 14.

accordance with Local Civil Rule 54.2. The determination of the fee amount shall be held in abeyance pending the outcome of any appeal on liability by Defendant. LCvR 54.2(b).

October 22, 2004

/s

Thomas F. Hogan
Chief Judge

ADOPTED BY THE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT ON DECEMBER 8, 2006

109th CONGRESS, 2nd SESSION

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

IN THE MATTER OF REPRESENTATIVE JAMES McDERMOTT

DECEMBER 6, 2006

Mrs. BIGGERT from the Investigative Subcommittee submitted the following

REPORT

To the Committee on Standards of Official Conduct.

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Lucille Roybal-Allard, California
Robert C. Scott, Virginia

Kenneth E. Kellner, Counsel to the Investigative Subcommittee
Stan P. Simpson, Counsel to the Investigative Subcommittee

I. INTRODUCTION

On November 16, 2004, Representative David L. Hobson filed a complaint alleging that Representative James McDermott violated certain laws, rules and standards of conduct in disclosing to the news media the contents of an intercepted telephone conversation in January 1997. The intercepted telephone conversation related to proceedings of the Committee on Standards of Official Conduct (the "Committee") regarding Representative Newt Gingrich, who was a Member of the House at that time. Until mid-January 1997, Representative McDermott served as Ranking Minority Member of the House Select Committee on Ethics, which had been created at the beginning of the 105th Congress for the sole purpose of completing action on the aforementioned matter involving Representative Gingrich.

On December 28, 2004, the Chairman and Ranking Minority Member of the Committee jointly determined to establish an Investigative Subcommittee and to forward portions of Representative Hobson's complaint to that body. The Investigative Subcommittee was charged with conducting an inquiry on allegations that Representative McDermott's conduct violated the House Code of Official Conduct (clause 1 of which provides that Members and staff shall conduct themselves "at all times in a manner which shall reflect creditably on the House of Representatives"), provisions of the Code of Ethics for Government Service, the Committee member non-disclosure agreement, or the Committee confidentiality rules.

On March 20, 2006, the Committee voted to carry over this matter regarding Representative McDermott to the 109th Congress.

A summary and explanation of the Investigative Subcommittee's findings are set forth in this Report.

II. SUMMARY OF EVENTS AND FACTUAL FINDINGS

A. Committee Proceedings Involving Former Representative Newt Gingrich

The relevant Committee proceedings involving former Representative Newt Gingrich are summarized in the Report of the Select Committee on Ethics to the House entitled "In the Matter of Representative Newt Gingrich," and an additional Committee publication entitled "Sanction Hearing and Related Materials."[1] As summarized in those materials, the matter involving Representative Gingrich was initiated during the 103rd Congress following a complaint filed with the Committee on September 7, 1994 by Ben Jones. Mr. Jones was Representative Gingrich's opponent in his 1994 campaign for reelection, and his complaint was filed in accordance with Committee and House rules at that time that permitted formal complaints to be filed by persons other than Members of the House.[2] The focus of Mr. Jones' complaint was a course taught by Representative Gingrich called "Renewing American Civilization."[3] The complaint alleged that Representative Gingrich used his congressional staff to work on the course, and that Representative Gingrich created the course under the

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[1] *See In the Matter of Representative Newt Gingrich*, H. Rep. 105-1, 105th Cong., 1st Sess. (Jan. 17, 1997) *("Rep. Gingrich Report"); Sanction and Related Materials, Hearing Before the Select Committee on Ethics*, 105th Cong. 1st Sess. (Comm. Print Jan. 17, 1997) *("Rep. Gingrich Hearing Materials").*

[2] *Rep. Gingrich Report* at 1; Committee on Standards of Official Conduct ("Committee") Rule 14 (103rd Congress). Mr. Jones was a former Member of the House at the time he filed his complaint. Mr. Jones served in the House during the 101st and 102nd Congresses (1989 to 1993).

[3] *Rep. Gingrich Report* at 1.

sponsorship of Section 501(c)(3) organizations "to meet certain political, not educational, objectives," and by doing so caused a violation of Section 501(c)(3) of the Internal Revenue Code to occur.[4]

The matter was not resolved by the Committee before the end of the 103rd Congress, and on January 26, 1995, Representative David Bonior filed an amended version of the complaint previously filed by Mr. Jones.[5] On December 6, 1995, the Committee voted to initiate a "Preliminary Inquiry" into the allegations of misuse of tax-exempt organizations and appointed an investigative subcommittee (hereafter "Gingrich Subcommittee") to conduct the inquiry.[6] The Chairman of the Gingrich Subcommittee was Representative Porter J. Goss, and Representative Benjamin L. Cardin served as the Investigative Subcommittee's Ranking Minority Member. The other two Members of the subcommittee were Representative Steven Schiff and Representative Nancy Pelosi. The Committee also determined to appoint a Special Counsel to assist the Gingrich Subcommittee.

On September 26, 1996, the Gingrich Subcommittee announced that the investigation of Representative Gingrich was being expanded into several additional areas.[7] The subcommittee concluded its investigation work on December 12, 1996.[8] On December 15, 1006, the Gingrich Subcommittee and Representative Gingrich, through their respective counsel, initiated discussions towards resolving the matter without proceeding to a formal adjudicatory hearing in accordance with the rules

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[4] *Id.*

[5] *Id.*

[6] *Id.* at 1-2.

[7] The specific areas of expansion are set forth in *Rep. Gingrich Report* at 2.

[8] *Rep. Gingrich Report* at 3.

of the Committee at that time.[9] A negotiated resolution was reached by the parties, and on December 21, 1996, the Gingrich Subcommittee adopted a Statement of Alleged Violation describing conduct by Representative Gingrich which the subcommittee concluded violated then-House Rule 43, Clause 1 of the Rules of the House of Representatives (current House Rule 23, Clause 1).[10] On that same date, Representative Gingrich executed an Answer admitting to the Statement of Alleged Violation.[11] The Statement of Alleged Violation adopted by the Gingrich Subcommittee and Representative Gingrich's Answer were released publicly by the subcommittee on December 21, 1996.[12]

As part of the negotiated resolution of the matter, the subcommittee and Representative Gingrich agreed that "no public comment should be made about this matter while it is still pending. This includes having surrogates sent out to comment on the matter and attempt to mischaracterize it."[13] Further, beyond the press statements agreed to by the parties, "neither Mr. Gingrich nor any Member of the subcommittee may make any further public comment."[14] The agreement on this topic pertained to "press statements," and Members of the Gingrich Subcommittee and Representative Gingrich were free to engage in "private conversations with Members of Congress about these matters."[15]

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[9] *Id.* at 94.

[10] *Rep. Gingrich Hearing Materials* at 92.

[11] *Id.* at 91.

[12] *Id.* at 90.

[13] *Rep. Gingrich Report* at 95.

[14] *Id.* at 95.

[15] *Id.* at 95-96.

Due to the timing of the Gingrich Subcommittee's actions regarding Representative Gingrich, that body and the Committee were not able to formally present the subcommittee's findings and recommendations to the House in accordance with Committee rules prior to the conclusion of the 104th Congress. At the start of the 105th Congress on January 7, 1997, the House established a Select Committee on Ethics, and appointed as Members of that Committee all of the Members who were on the standing Committee on Standards of Official Conduct at the expiration of the 104th Congress. The Select Committee on Ethics was given jurisdiction by the House "only to resolve the Statement issued by the Investigative Subcommittee of the standing Committee on Standards of Official Conduct in the One Hundred Fourth Congress relating to the official conduct of Representative Gingrich of Georgia and otherwise report to the House on the activities of that investigative subcommittee."[16] The House further provided in the Rules of the House of Representatives for the 105th Congress that in the exercise of its jurisdiction, the Select Committee on Ethics "shall possess the same authority as, and shall conduct its proceedings under the same rules, terms, and conditions . . . as those applicable to the standing Committee on Standards of Official Conduct in the One Hundred Fourth Congress[.]"[17] The House Rules

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[16] House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997).

[17] *Id.; see also Rep. Gingrich Report* at 2. The House could have reestablished the Committee on Standards of Official Conduct as a standing committee at the start of the 105th Congress. However, it was determined during that time period that before reestablishing the Committee as a standing committee, the House needed to "reassess" its "standards process," and to empanel a bipartisan task force "to review the existing House standards process and recommend reforms of that process." *Report of the Ethics Reform Task Force on H. Res. 168*, 105th Cong., 1st Sess. (Comm. Print June 17, 1997) at

also provided that "the select committee shall cease to exist upon final disposition by the House of a report designated by the select committee of its final report on the matter, or at the expiration of January 21, 1997, whichever is earlier."[18]

On January 17, 1997, the Select Committee on Ethics held a sanction hearing in the matter pursuant to then-Committee Rule 20. Following the hearing, the Select Committee on Ethics issued its report to the House, which recommended that Representative Gingrich be reprimanded and ordered to reimburse the House for costs associated with the Committee's investigation. On January 21, 1997, the House adopted the report of the Select Committee on Ethics *In the Matter of Representative Newt Gingrich*.[19] In a section of the report entitled "*Post-December 21, 1996 Activity*," the report disclosed that "[i]n the opinion of the Subcommittee Members and the Special Counsel, a number of the press accounts [following release of the Statement of Alleged Violation] indicated that Mr. Gingrich had violated the agreement concerning statements about the matter." Further, the report state that

> Mr. Gingrich's counsel was notified of the Subcommittee's concerns and the Subcommittee met to consider what action to

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1. In brief, interest had developed in the House in "reexamining ways to better ensure that the standards process in the House functions in a manner that is nonpartisan, efficient and fair." *Id.* In substantial measure, the current Committee on Standards of Official Conduct functions in accordance with the rules of procedure adopted by the House following the report and recommendations of the aforementioned bipartisan task force.

[18] House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997).

[19] *See* H. Res. 31, 105th Cong., 1st Sess. (Jan. 21, 1997).

> take in light of this apparent violation. The Subcommittee determined that it would not nullify the agreement. While there was serious concern about whether Mr. Gingrich had complied with the agreement, the Subcommittee was of the opinion that the best interests of the House still lay in resolving the matter without a disciplinary hearing and with the recommended sanction that its Members had previously determined was appropriate. However, Mr. Gingrich's counsel was informed that the Subcommittee believed a violation of the agreement had occurred and retained the right to withdraw from the agreement with appropriate notice to Mr. Gingrich.[20]

The report did not specify the conduct engaged in by Representative Gingrich that raised concerns with the Gingrich Subcommittee.

B. Conduct of Representative James McDermott

In the instant matter, the focus of the Investigative Subcommittee's inquiry involving Representative McDermott was on the disclosure by Representative McDermott to members of the news media of the contents of an illegally intercepted telephone conference. The conduct of Representative McDermott that is now under review occurred in January 1997 while he was the Ranking Minority Member of the House Select Committee on Ethics. As referenced below, in substantial measure, the factual conclusions made by the Investigative Subcommittee regarding Representative McDermott's conduct are based on admissions made by Representative McDermott during the course of ongoing federal court civil litigation with Representative John A. Boehner. Sources of the referenced admissions include transcribed sworn statements made during a civil deposition of

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[20] *Rep. Gingrich Report* at 96.

Representative McDermott during the litigation.[21] Key events in the civil litigation proceedings between Representative McDermott and Representative Boehner are described in a separate section in this Report.

The Investigative Subcommittee also requested and obtained materials from the Department of Justice related to that agency's investigation of this matter, and additionally subpoenaed documents from Representative McDermott. By letter dated July 19, 2006, Representative McDermott was invited by the Investigative Subcommittee to present a statement to the Investigative Subcommittee in accordance with Committee Rule 19(a)(3). Representative McDermott declined to make a statement in accordance with that rule.

Representative McDermott has been a Member of the House representing the Seventh District of Washington since 1989. Representative McDermott was Ranking Minority Member of the Committee on Standards of Official Conduct during the 104th Congress.[22] As such, he became Ranking Minority Member of the House Select Committee on Ethics on January 7, 1997, in accordance with House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997).

On December 21, 1996, two individuals, John Martin and Alice Martin, while near Lake City in Columbia County, Florida, used a scanner to intentionally intercept a wire communication in the form of a cellular telephone

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[21] Representative McDermott was deposed in the civil case on July 24, 2002 and December 12, 2002.

[22] Representative McDermott was Chairman of the Committee on Standards of Official Conduct during the 103rd Congress, and he also served as a Member of the Committee during the 102nd Congress.

call.[23] The intercepted telephone call was a conference call whose participants included Representative Gingrich, Representative Boehner and others.[24] The record indicates that Mr. and Mrs. Martin, while traveling, overheard a telephone conversation using a scanning device that was purchased at Radio Shack. They recognized some of the voices in the conversation. Mr. Martin, using a handheld tape recorder that was in his car, recorded the conversation.[25]

According to a *New York Times* article by Adam Clymer published on January 10, 1997 (discussed in more detail below), the participants in the telephone call recorded by the Martins included Representative Boehner, Representative Gingrich, Representative Richard Armey, Ed Bethune (a former Member of the House then serving as Representative Gingrich's lawyer), Ed Gillespie (reported in the *New York Times* article as

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[23] *See* Transcript of Sentencing Proceedings before the Honorable Harvey E. Schlesinger in *United States v. Alice Martin and John Martin*, (M.D. Fla. April 25, 1997) at 23. An investigation of the Martins' conduct was conducted by the Department of Justice, and, as reflected by the cited transcript of court proceedings, on April 25, 1997, John and Alice Martin pleaded guilty to violating 18 U.S.C. §§ 2511(1)(a) and 2511(4)(b)(ii), provisions of law which prohibit the intentional interception of the radio portion of a cellular telephone call. John and Alice Martin were each sentenced to pay a fine of $500. *Id.* at 52. A press statement of the Department of Justice dated April 23, 1997 regarding the investigation of the Martins states that "[b]ecause the interception involved the radio portion of a cellular telephone communication, and because there is no evidence that the interception was for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private financial gain, the U.S. Code classifies [the Martins'] offense as an infraction. The maximum penalty is a $5,000 fine." *See* Exhibit 1.

[24] *Id.* at 23.

[25] *Id.* at 38-39.

communications director of the Republican National Committee), Representative Bill Paxon, and Representative Tom DeLay.[26] Representative Boehner participated in the conference call on a cellular phone inside his car while parked outside a restaurant in northern Florida.[27] The subject of the telephone conference call, as far as can be gleaned from the *New York Times* article, was the content of statements that may be made publicly related to the inquiry of the Investigative Subcommittee involving Representative Gingrich.[28]

On January 8, 1997, Mr. and Mrs. Martin personally delivered a copy of a tape in an envelope to Representative McDermott in one of the rooms of the Committee on Standards of Official Conduct, which is located in Suite HT-2 in the United States Capitol Building.[29]

The record supports a finding that the tape the Martin delivered to Representative McDermott was accompanied by a letter to Representative McDermott. Representative McDermott testified in his deposition that he has no recollection of seeing a letter from the Martins at the time they delivered the tape to him, or whether the tape was accompanied by a letter.[30] A copy of a letter from the

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[26] *"Gingrich Is Heard Urging Tactics in Ethics Case," N.Y. Times* (Jan. 10, 1997) (Exhibit 2).

[27] Rep. Boehner Dep. at 9.

[28] *See* Exhibit 2. The Investigative Subcommittee does not have a copy of the tape at issue, nor a complete or verifiable transcript thereof. The last known location of the tape was the Department of Justice, which received it from Chairman Johnson of the House Select Committee on Ethics on or about January 13, 1997. *See* Exhibit 3.

[29] Rep. McDermott Dep. at 157-58.

[30] *Id.* at 150, 153.

Martins addressed to Representative McDermott was obtained by the Investigative Subcommittee from records filed in the United States District Court in connection with the *Boehner v. McDermott* civil litigation. The transcript of the deposition of Representative McDermott taken during the litigation indicates that Representative McDermott obtained a copy of the letter from the Department of Justice, and that Representative McDermott subsequently produced that copy of the letter to Representative Boehner during the discovery phase of the litigation.[31]

The letter, dated January 8, 1997, and addressed to "Jim McDermott, Ranking Member," contained the following text:

> Enclosed in the envelope you will find a tape of a conversation heard December 21, 1996 at about 9:45 a.m. The call was a conference call heard over a scanner. We felt the information included were [sic] of importance to the committee. We live in the 5th. [sic] Congressional District and attempted to give the tape to Congresswoman Karen Thurman. We were advised by her to turn the tape directly over to you. We also understand that we will be granted immunity.
>
> My husband and I work for Columbia County Schools in Columbia County Florida. We pray that committee [sic] will consider our sincerity in placing it in your hands.
>
> We will return to our home today.
>
> Thank you for your consideration.
>
> John and Alice Martin.[32]

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[31] *Id.* at 151.

[32] *See* Exhibit 4.

At his deposition, Representative McDermott described the circumstances of his receiving the tape from the Martins as follows:

> During a break of the Ethics Committee, I was standing in the anteroom by the door to the hallway and someone asked if I was Congressman McDermott and I said yes. And this couple came up to me and said they had, they wanted to give me something that they thought I would be interested in.
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> And I said, who are you? And they said John and whatever his wife's name Martin is. And I said where are you from? And they, I have, I mean there were eight or nine people standing around there and I don't remember exactly whether they told me they were from Karen Thurman's district or—I don't remember exactly. But they told me they were in North Florida and then he gave me a card, and I said thank you, I'll listen to it.[33]
>
> It couldn't have been more than 30 seconds. I mean, I was just trying to get rid of them. Take whatever they had, whoever they were, put it in my pocket and go on with my business. Because I had enough on my mind at that point.[34]

Representative McDermott also described his encounter with the Martins in a separate declaration he executed on December 11, 2002 in connection with the *Boehner v. McDermott* litigation. Representative McDermott stated in that document that:

> On or about January 8, 1997, I was approached by a man and woman in the anteroom of the

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[33] Rep. McDermott Dep. at 157-158.

[34] *Id.* at 176.

> House of Ethics Committee. They asked me whether I was Congressman McDermott. After I acknowledged who I was, the man and woman identified themselves as Mr. and Mrs. Martin and handed me an envelope. The Martins said that the envelope contained a tape recording that they thought would be of interest to me and asked me to listen to it. I said that I would.
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> Until that encounter, neither I, nor my staff, nor anyone acting on my behalf had any knowledge of the Martins or their tape. I had no idea what the tape contained when the Martins handed it to me, because they never discussed its contents with me. I did not learn of the contents of the tape until I returned to my office later and listened to the tape. No one else was present when I listened to the tape.
>
> I have never had any communications with the Martins other than during that single encounter on or about January 8, 1997. I have never asked anyone to communicate with the Martins, directly or indirectly, at any time or for any reason. Neither I, nor my staff, nor anyone on my behalf, has ever talked about the subject of immunity with the Martins.[35]

Rep. McDermott estimated that he received the package containing the tape from the Martins at approximately 5:00 p.m.[36] He described the envelope as an "81/2 by 11 envelope," and the tape as "one of those little tiny tapes like you have in a hand-held recorder or a

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[35] Declaration of James A. McDermott dated December 11, 2002 (filed in *Boehner v. McDermott* civil litigation as Exhibit F to Rep. McDermott's Opposition to Rep. Boehner's Motion for Summary Judgment).

[36] Rep. McDermott Dep. at 160.

telephone answering machine."[37] He also testified that he was present at the offices of the Committee to participate in a Committee meeting related to the Committee's consideration of the matter involving Representative Gingrich.[38]

Representative McDermott returned to his personal office in the Rayburn House Office Building at approximately 7:00 p.m. and listened to the tape on a handheld tape recording device that he had in his office.[39] Representative McDermott recognized some of the voices on the tape, including those of Representative Gingrich and Representative Richard Armey.[40] Subsequent to listening to the tape, Representative McDermott contacted Jeanne Cummings of the *Atlanta Journal-Constitution* and left a voicemail for her.[41] Representative McDermott also contacted Adam Clymer of *New York Times* and invited him to Representative McDermott's office that evening. Mr. Clymer accepted Representative McDermott's invitation.[42] During their meeting, Representative McDermott played the tape he received from the Martins for Mr. Clymer and he permitted Mr. Clymer to make a recording of the tape.[43]

Ms. Cummings of the *Atlanta Journal-Constitution* returned Representative McDermott's telephone call the

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[37] *Id.* at 159.

[38] *Id.* at 160.

[39] *Id.* at 162, 163.

[40] Response of Rep. McDermott to Rep. Boehner's Statement of Undisputed Facts in Support of His Motion For Summary Judgment (hereafter "Rep. McDermott Response to SUF") at ¶ 18.

[41] *Id.* at ¶ 21.

[42] Rep. McDermott Dep. at 183-84.

[43] *Id.* at 186-187.

next morning and subsequently came to his office in the Rayburn House Office Building. Ms. Cummings listened to the tape, doing so in the bathroom in Representative McDermott's office.[44]

As noted above, on January 10, 1997, the *New York Times* published an article by Mr. Clymer about the tape and its contents, and the article included a reported transcript of at least part of the tape.[45] The article references an anonymous Congressional source for the tape, but Representative McDermott subsequently acknowledged that he was the source for the newspaper.[46] On the morning of January 10, 1997, after he "read the newspaper," Representative McDermott met, at Representative McDermott's request, with James Cole, the Special Counsel to the House Select Committee on Ethics. According to Representative McDermott, he "realized, from the way [the newspaper article] was written and from the placement in the paper, that it was going to be an issue of public controversy and I thought I ought to talk to a lawyer. And, as I saw it, the perfect person was Jim Cole, if he would talk to me, because he knew the case, he knew everything. And I wanted to talk to him and see what he would say. So I contacted him."[47] The record does not indicate that Mr. Cole actually rendered any legal advice to Representative McDermott when they met.[48]

On January 13, 1997, the Martins held a press conference stating that they had given a copy of the taped intercepted telephone conversation to Representative

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[44] *Id.* at 92; Rep. McDermott Response to SUF at ¶¶ 28, 29.

[45] *See* Exhibit 2.

[46] Rep. McDermott Dep. at 220-221.

[47] *Id.* at 307.

[48] *See id.* at 331.

McDermott.[49] On that same day, Representative McDermott transmitted his copy of the tape in its original envelope to Chairman Nancy Johnson of the House Select Committee on Ethics.[50] In response to this action, the Chief Counsel of the House Select Committee on Ethics transmitted a letter to Representative McDermott, dated January 13, 1997, that stated:

> This is to notify you that the material you sent to the Committee at 4:33 p.m. this afternoon was not accepted. By direction of the Chair and after consultation with the Chief Counsel of the Criminal Division of the Department of Justice, the contents of the envelope including the audio cassette tape and the cover letter

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[49] *2 Floridians Talk of How They Taped The Speaker, N.Y. Times* (Jan. 14, 1997) (Exhibit 5). *See also* Rep. McDermott Response to SUF at ¶ 40. According to the *New York Times* article, the Martins stated that they were responsible for intercepting Rep. Boehner's conversation, and they identified Rep. McDermott as the person to whom they delivered the tape:

> The middle-aged couple—he is a maintenance man at a school and she is a teacher's aide—are active in both the National Education Association and the Democratic Party in their home county of Columbia in northern Florida, so they have a keen interest in politics. Mr. Martin said they had used a small tape recorder to record the conversation, planning to play back the voice of the famous politician someday for their grandson, who is expected to be born in three weeks. But as they listened, they changed their mind. They took the tape to their Representative, Karen L. Thurman, a Democrat, and later, on her advice, took the tape to the Senior Democrat on the House Ethics Committee, Representative Jim McDermott. . . . Mrs. Martin said she and her husband had hand-delivered the tape to Mr. McDermott. "He took the envelope in his hand and said he would listen to it," she said.

[50] Rep. McDermott Dep. at 213

were hand delivered to the Department of Justice early this evening.[51]

Representative McDermott resigned from the House Select Committee on Ethics on January 13, 1997. Representative McDermott's answer to Representative Boehner's amended civil complaint states that "Congressman McDermott concluded that the political controversy over the Tape might impede the House Ethics Committee from completing its work if he continued to serve on it."[52] Representative McDermott further testified in his deposition that "I recognized that this was going to be a distraction and I wanted to get it out of the way."[53] Representative McDermott also testified that he does not remember if at the time he determined to resign from the House Select Committee on Ethics if he was aware that the Martins had publicly disclosed their giving of the tape to him.[54]

On or about January 14, 1997, Representative McDermott transmitted a letter to the Chairman of the House Select Committee on Ethics to communicate his objection to her forwarding of the copy of the taped intercepted telephone conversation to the Department of Justice. Representative McDermott's letter expressed his "considerable chagrin" at this course of action, and also his view that the Chairman's action violated House Rule X, cl. 4(e)(1)(C) of the Rules of the House for the 105th Congress.[55]

Representative McDermott testified during his deposition that based on the tape he received from the

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[51] *See* Exhibit 3.

[52] Rep. McDermott's Answer to Rep. Boehner's Amended Complaint at ¶ 26.

[53] Rep. McDermott Dep. at 137.

[54] *Id.* at 133.

[55] *See* Exhibit 6.

Martins, he understood that Representative Gingrich reached an agreement with the Gingrich Subcommittee that Representative Gingrich "was entitled to make a public statement, but [Representative Gingrich] apparently had agreed not to orchestrate any kind of response to undermine the statement or to undermine the work of the committee."[56] In Representative McDermott's view, based on the recorded telephone call, Representative Gingrich was "participating in orchestration and violating the agreement."[57] In his testimony, Representative McDermott indicated his view that the "public had a right to know" about the information contained on the tape.[58] He stated: "I came into politics during the Vietnam era . . . . And I knew about the Pentagon Papers. And there are some things the people are entitled to know, one of which is what the person who's third in line to be President of the United States, how he deals with issues."[59] He also indicated in his court filings that he believed that "the First Amendment entitled him to share the tape with the press as truthful information of public concern that he had lawfully obtained from another,"[60] and that "if a member of the House Ethics Committee received information from sources outside the Committee and outside the context of Committee proceedings, then he would have been free to disclose it under the House Ethics Committee Rules in effect in January, 1997."[61]

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[56] Rep. McDermott Dep. at 33.

[57] *Id.* at 45; Rep. McDermott Response to SUF at ¶ 76.

[58] Rep. McDermott Dep. at 61.

[59] *Id.*: *see also id.* at 271-72 ("My disclosure was done because I felt the people had a right to know about the behavior of a Public Official.")

[60] Rep. McDermott Response to SUF at ¶ 78.

[61] *Id.* at ¶ 79.

C. Representative Boehner's Lawsuit Against Representative McDermott

As referenced in the foregoing discussion, Representative McDermott's conduct in disclosing to the media the copy of the tape furnished to him by John and Alice Martin became the subject of a lawsuit filed in the United States District Court for the District of Columbia by Representative John A. Boehner. Representative Boehner, the plaintiff, initiated the lawsuit in a complaint he filed on March 9, 1998. Representative Boehner's complaint alleged that Representative McDermott, the defendant, knowingly disclosed an unlawfully intercepted communication in violation of the federal wiretapping statute, 18 U.S.C. § 2511(1)(c) and a Florida wiretapping statute, Fla. Stat. § 934.01(1)(c). 18 U.S.C. § 2511 provides, in pertinent part, that:

> (1) Except as otherwise specifically provided in this chapter any person who—
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Section 2520 permits "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of" 18 U.S.C. § 2511 to initiate a civil suit to recover equitable and declaratory relieve and monetary damages. The cited Florida statute contains language substantially similar to that of 18 U.S.C. § 2511(1)(c).

The ongoing litigation is now proceeding on its second round of appellate level review, having once already been

addressed by United States Supreme Court and remanded back to the lower courts. The presiding United States District Judge in this matter is Chief Judge Thomas F. Hogan. In the early stages of the litigation, Judge Hogan granted a motion to dismiss the litigation filed by Representative McDermott, holding that the First Amendment protected disclosure of lawfully obtained information.[62] The United States Court of Appeals for the District of Columbia Circuit reversed Judge Hogan's decision and held that the federal wiretapping statute was not unconstitutional as applied to Representative McDermott.[63] The Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case in light of the Supreme Court's decision in *Bartnicki v. Vopper*, 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001).[64] On remand from the Supreme Court, the Court of Appeals remanded the matter back to the United States District Court, concluding that it "would benefit from having the district court pass upon the arguments that have taken on new-found importance after *Bartnicki*."[65]

After the matter returned to the district court in 2001, the parties in the litigation engaged in discovery and filed cross-motions for summary judgment. On August 20, 2004, Judge Hogan held that Representative McDermott violated 18 U.S.C. § 2511(1)(c) when he disclosed the tape furnished to him by the Martins to members of the news media. *Boehner v. McDermott*, 332 F. Supp. 2d 149, 158

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[62] *See Boehner v. McDermott*, No. 98-594, 1998 WL 436897, at *7 (D.D.C. July 28, 1998), *rev'd*, 191 F.3d 463 (D.C. Cir. 1999)).

[63] *Boehner*, 191 F. 3d at 478.

[64] *See McDermott v. Boehner*, 532 U.S. 1050, 121 S. Ct. 2190, 149 L. Ed. 2d 1022 (2001).

[65] *Boehner v. McDermott*, 22 Fed. Appx. 16, 2001 WL 1699420 (D.C. Cir. 2001).

(D.D.C. 2004). In a subsequent order on October 22, 2004, Judge Hogan ordered that Representative McDermott pay Representative Boehner $10,000 in statutory damages, $50,000 in punitive damages, and reasonable attorneys fees and costs. In the same order, Judge Hogan held the matter of the amount of attorneys fees in abeyance pending resolutions of appeals in the litigation.

On March 28, 2006, a 2-1 decision by a three judge panel of the United States Court of Appeals for the District of Columbia upheld Judge Hogan's ruling in favor of Representative Boehner. The essential disagreement between the majority and the dissenting judge was whether the First Amendment of the Constitution protected Representative McDermott from prosecution for his disclosure of the taped telephone conversation he received from the Martins. *See Boehner v. McDermott*, 441 F.3d 1010, 1017 (D.C. Cir. 2006).

On June 23, 2006, Representative McDermott's petition for a rehearing en banc was granted by the United States Court of Appeals for the District of Columbia Circuit. The Court vacated the judgment of the three panel that was filed on March 28, 2006.[66] The case was reheard by the court sitting en banc on October 31, 2006, and no decision has yet been rendered.

D. Representative Hobson's Complaint and the Jurisdiction of the Investigative Subcommittee

As noted previously, on December 28, 2004, the Chairman and Ranking Minority Member of the Committee determined to forward portions of Representative Hobson's complaint to the Investigative Subcommittee. In a public statement on that same date, the Chairman and Ranking Minority Member of the Committee announced that "the subcommittee will

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[66] *See Boehner v. McDermott*, No. 04-7203 (D.C. Cir. Order filed June 23, 2006).

conduct an inquiry on allegations that Representative McDermott's conduct violated the House Code of Official Conduct (clause 1 of which provides that Members and staff shall conduct themselves "at all times in a manner which shall reflect creditably on the House of Representatives"), provisions of the Code of Ethics for Government Service, the committee member non-disclosure agreement, or the Committee confidentiality rules."[67] As noted below, the Investigative Subcommittee interpreted this announcement as limiting its inquiry to violations of House and Committee rules, and not requiring the Investigative Subcommittee to reach an independent judgment as to whether Representative McDermott violated a federal statute, *i.e.*, 18 U.S.C. § 2511, a question pending before the United States Court of Appeals for the District of Columbia Circuit. In other words, the Investigative Subcommittee's charge was to determine whether Representative McDermott's conduct, which might or might not support a finding of a violation of federal law, was a violation of House and Committee rules applicable to him as a Member of the House and as Ranking Minority Member of the House Select Committee on Ethics. The Investigative Subcommittee also addressed specifically the question of the applicability of House Rule 23, Clause 10 to Representative McDermott, because that was one of the matters in Representative Hobson's complaint that was referred to the Subcommittee.

E. Applicable Confidentiality Rules During the 104th Congress

During the 104th Congress (1995-1996) and during the temporary existence in January 1997 of the House Select Committee in the 105th Congress, two rules of the

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[67] *See* Exhibit 7 (Statement of Chairman Joel Hefley and Ranking Minority Member Alan B. Mollohan dated December 28, 2004).

Committee on Standards of Official Conduct—Rule 9 and Rule 10(b)—addressed the topic of confidentiality by Members and staff of the Committee.[68]

Rule 9 of the Rules of the Committee on Standards of Official Conduct provided:

> *Communications by Committee Members and Staff*
>
> Committee members and staff shall not disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee, nor shall any evidence in the possession of an investigative subcommittee be disclosed to Committee members who are not members of the subcommittee prior to the filing of a Statement of Alleged Violation with the Committee.

Rule 10(b) of the Rules of the Committee on Standards of Official Conduct provided:

> *Committee Records*

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[68] As explained earlier in this Report, the relevant rules in effect during the 104th Congress are implicated in this matter even though the conduct under review occurred during the 105th Congress. *See* House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997) (The Select Committee on Ethics "shall possess the same authority as, and shall conduct its proceedings under the same rules, terms, and conditions . . . as those applicable to the standing Committee on Standards of Official Conduct in the One Hundred Fourth Congress[.]"). We further note that Committee Rules 9 and 10(b) for the 104th Congress appear to implement House Rule X, Clause 4(e)(2)(F) (104th Congress), which provided with regard to the Committee that "[n]o information or testimony received, or the contents of a complaint or the fact of its filing, shall be publicly disclosed by any committee or staff member unless specifically authorized in each instance by a vote of the full committee."

> Members and staff of the Committee shall not disclose to any person or organization outside the Committee, unless authorized by the Committee, any information regarding the Committee's or a Subcommittee's investigative, adjudicatory or other proceedings, including, but not limited to: (i) the fact of or nature of any complaints; (ii) executive session proceedings; (iii) information pertaining to or copies of any Committee or subcommittee report, study, or other document which purports to express the views, findings, conclusions, or recommendations of the Committee or subcommittee in connection with any of its activities or proceedings; or (iv) any other information or allegation respecting the conduct of a Member, officer, or employee.

Neither Committee nor House rules during the 104th Congress mandated the execution of a formal confidentiality oath by Members of the Committee. However, during the 104th Congress, the Committee determined to implement a policy under which its Members would sign a "Nondisclosure Agreement" containing the following text:

> The purpose of this Nondisclosure Agreement is to ensure the confidentiality of all information received or processed by the Committee on Standards of Official Conduct (the Committee).
>
> I do solemnly swear (or affirm) that I will not disclose any information received in the course of my service with the Committee in accordance with Committee Rule 10, except when authorized by the Committee or the House of Representatives.

Committee records do not contain a copy of any such agreement executed by Representative McDermott, although there are copies of the agreement signed by all

other Members of the Committee during the 104th Congress. The record does not indicate that the House Select Committee on Ethics, established in January 1997, implemented a requirement that Members of that body sign nondisclosure agreements, although arguably formal action implementing such a policy was not necessary due to the instructions of the House that the House Select Committee on Ethics "shall possess the same authority as, and shall conduct its proceedings under the same rules, terms, and conditions . . . as those applicable to the standing Committee on Standards of Official Conduct in the One Hundred Fourth Congress[.]"[69]

For the purpose of completeness, the Investigative Subcommittee notes that it was not until the adoption of H. Res. 168 (September 18, 1997) during the 105th Congress (1996-1997)—implementing the recommendations of the bipartisan House Ethics Reform Task Force—that a confidentiality oath requirement for Members of the Committee was added to House rules.

Specifically, the 1997 Report of the Ethics Reform Task Force stated that "[e]nsuring the confidentiality of Standards Committee deliberations and matters pending before the Committee is essential to protect the rights of individuals accused of misconduct, preserve the integrity of the investigative process, and cultivate collegiality among Committee members."[70] Towards this end, it was recommended that House rules require that Committee Members, "pool" Members, and Committee staff execute a confidentiality oath before they have access to information that is confidential under Committee rules.[71]

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[69] *See* House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997).

[70] *See* Report of the Ethics Reform Task Force on H. Res. 168, 105th Cong., 1st Sess., at 10-11 (June 17, 1997).

[71] *Id.*

The text of the proposed oath was as follows: " I do solemnly swear (or affirm) that I will not disclose, to any person or entity outside the Committee on Standards of Official Conduct, any information received in the course of my service with the committee, except as authorized by the Committee or in accordance with its rules." In accordance with the recommendations of the Task Force, breaches of confidentiality would be investigated by the Committee and a proven violation of the confidentiality oath by a Member or employee of the Committee would be a violation of House rules.[72] A formal oath requirement was added to the Committee's rules on September 30, 1997, and is currently codified as Committee Rule 7(a).

III. CONCLUSIONS AND RECOMMENDATIONS

A. Federal Statute Prohibiting Disclosure of Illegally Intercepted Electronic Communications (18 U.S.C. § 2511)

The Investigative Subcommittee reached no conclusion as to whether Representative McDermott violated 18 U.S.C. § 2511 in connection with his disclosure to the news media of the contents of a taped intercepted telephone conversation furnished to him by the Martins, as it was not the mandate of the Investigative Subcommittee to resolve this question. Rather, the focus of the Investigative Subcommittee's inquiry was whether, by the same conduct which may or may not establish a violation of law in the federal court proceedings between Representative McDermott and Representative Boehner, Representative McDermott also violated "the House Code of Official Conduct (Clause 1 of which provides that Members and staff shall conduct themselves "at all times

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[72] *Id.* The floor debate on H. Res. 168 also addressed the importance of improving the confidentiality of the Committee's work as means to "maintain the integrity of the process." 143 Cong. Rec. H7546 (daily ed. Sept. 18, 1997) (statement of Rep. Cardin).

in a manner which shall reflect creditably on the House of Representatives"), provisions of the Code of Ethics for Government Service, the committee member non-disclosure agreement, or the Committee confidentiality rules."[73] In any event, given the important and novel issues of First Amendment law involved in the *Boehner v. McDermott* litigation—as evidenced by the appellate and Supreme Court interest in the case—the Investigative Subcommittee concluded that the question of law should be left to the judicial branch.

B. Refraining from Legislative Activity (House Rule 23, Clause 10)

The Investigative Subcommittee concluded that there was no violation by Representative McDermott of House Rule 23, Clause 10. The findings of Judge Hogan on August 20, 2004 in the *Boehner v. McDermott* civil litigation do not implicate House Rule 23, Clause 10, which only applies where a Member of the House is "convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed"; *i.e.*, upon a plea of guilty by a Member in a criminal proceeding, or upon a court finding of guilty by judge or jury in a criminal proceeding. Regardless of the outcome of *Boehner v. McDermott* after all the appeal options are exhausted, that case is a civil matter between two private parties and does not implicate House Rule 23, Clause 10. The fact that the same statute may also establish a basis for criminal prosecution—using different procedures and a far more stringent burden of proof—does not alter this conclusion. Many statutes, including the Federal Election Campaign Act, contain options for both criminal and civil enforcement;[74] however, there was never any intention by the House to apply House Rule 23, clause 10 and thereby restrain "the

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[73] *See* Exhibit 7.

[74] *See* 2 U.S.C. § 437g.

maximum freedom of Members to represent their constituencies" in any circumstances other than those involving conviction in a criminal proceeding.[75] Regarding a proposal that the House amend the Code of Official Conduct to include the prohibition now encompassed in House Rule 23, Clause 10, the Committee reported to the House that it "recognizes a very distinguishable link in the chain of due process—that is, the point at which the defendant no longer has claim to the presumption of innocence. This point is reached in a criminal prosecution upon a plea of guilty or upon conviction by a jury or by a judge (or judges) if jury trial is waived. *It is to this condition, and only to this condition, that the proposed resolution is directed.*"[76]

C. Committee Rules Related to Confidentiality of Committee Proceedings and to the Obligations of a Ranking Minority Member of the Committee

The Investigative Subcommittee reviewed the applicable Committee rules related to the confidentiality of Committee proceedings and concluded that Representative McDermott's conduct, *i.e.*, his disclosure to the news media of the contents of the tape furnished to him by the Martins, was inconsistent with the spirit of the applicable rules and represented a failure on his part to meet his obligations as Ranking Minority Member of the House Select Committee on Ethics.

As noted, Rule 9 of the Rules of the Committee on Standards of Official Conduct for the 104th Congress prohibited disclosure by a Member of "any evidence relating to an investigation to any person or organization

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[75] *House Committee on Standards of Official Conduct, Policy of the House of Representatives With Respect to Actions by Members Convicted of Certain Crimes*, H. Rep. 94-76, 94th Cong., 1st Sess. (1975) at 4.

[76] *Id.* at 2 (emphasis added).

outside the Committee unless authorized by the Committee," and further prohibited "evidence in the possession of an investigative subcommittee [from] be[ing] disclosed to Committee members who are not members of the subcommittee prior to the filing of a Statement of Alleged Violation with the Committee. In addition, Rule 10(b) of the Rules of the Committee on Standards of Official Conduct for the 104th Congress prohibited disclosure by a Member, "unless authorized by the Committee" of "any information regarding the Committee's or a subcommittee's investigative, adjudicatory or other proceedings, including, but not limited to: (i) the fact of or nature of any complaints; (ii) executive session proceedings; (iii) information pertaining to or copies of any Committee or subcommittee report, study, or other document which purports to express the views, findings, conclusions, or recommendations of the Committee or subcommittee in connection with any of its activities or proceedings; or (iv) any other information or allegation respecting the conduct of a Member, officer, or employee."

The aforementioned rules support the House ethics processes by protecting the integrity and confidentiality of Committee and Investigative Subcommittee proceedings and deliberations, and protecting the rights of individuals accused of misconduct and subject to ethics proceedings.

Indeed, the purpose of the Committee's rules is emphasized in the foreword to the Rules of the Committee on Standards of Official conduct for the 104th Congress, adopted by the Committee on February 9, 1995, which states:

> The Committee on Standards of Official Conduct is unique in the House of Representatives. Consistent with the duty to carry out its advisory and enforcement responsibilities in an impartial manner, the Committee is the only standing committee of the House of Representatives the membership

> of which is divided evenly by party. These rules are intended to provide a fair procedural framework for the conduct of the Committee's activities and to help insure that the Committee serves well the people of the United States, the House of Representatives, and the Members, officers, and employees of the House of Representatives.[77]

The forward reflects the unique charter of the Committee to conduct its work in a non-partisan manner, and the threat posed to the integrity of the House *of even the appearance of unfairness* to Members under investigation or of bias or impartiality by Members of the Committee in fulfilling their responsibilities.

By his conduct in January 1997, Representative McDermott failed to meet this standard. Representative McDermott's secretive disclosure to the news media as to the alleged conduct of Representative Gingrich risked undermining the ethics process regarding that Member. Representative McDermott's actions were not consistent with the spirit of the Committee's rules.[78] In reaching this conclusion, the Investigative Subcommittee did not give weight to Representative McDermott's stated excuse for his conduct: the public's entitlement to be informed.

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[77] The identical foreword is contained in the Rules of the Committee for the current Congress.

[78] *See* House Rule 23, clause 2, providing that "[a] Member . . . shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof." House Rule 23, Clause 2, "has been interpreted to mean that *Members, officers, and employees may not do indirectly what they would be barred from doing directly,* House Ethics Manual at 15 (italics original), and that "a narrow technical reading of a House rule should not overcome its 'spirit' and the intent of the House in adopting that and other rules of conduct." *Id.* (citing Final Report of House Select Committee on Ethics, H. Rep. No. 95-1837, 95th Cong., 2d Sess. (1979) app. at 61).

This is not a justification for potentially undermining the House ethics process. In the normal course, Members entrusted to serve on the Committee have their first obligation to the integrity of the House ethics process, which itself supports public confidence in the institution of the House. A better course of action would have been for Representative McDermott to entrust the Committee *at the outset* with the information to which he alone on the Committee had access, and for that body, *collectively*, to make determinations, consistent with its rules, as it deemed appropriate.

The Investigative Subcommittee decided against further proceedings in this matter. The Investigative Subcommittee additionally recommends that the Report of the Investigative Subcommittee be released to the public with no further statement by the Committee beyond announcing release of this Report.

December 11, 2006

PRESS STATEMENT

IN THE MATTER OF REPRESENTATIVE JAMES MCDERMOTT

On December 8, 2006, the Committee on Standards of Official Conduct voted to adopt the attached *Report of the Investigative Subcommittee*, "In the Matter of Representative James McDermott," dated December 6, 2006, as the Report of the full Committee in this matter.

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FILED
OCT 31 2007
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SUPREME COURT, U.S.

No. 07-439

IN THE

Supreme Court of the United States

JAMES A. MCDERMOTT,

Petitioner,

v.

JOHN A. BOEHNER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

VICTORIA DORFMAN
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

MICHAEL A. CARVIN
Counsel of Record
LOUIS K. FISHER
CHRISTOPHER S. PERRY
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 2511(1)(c), which prohibits the knowing disclosure of an illegally intercepted communication, is constitutional as applied in this case, where (1) the House Ethics Committee concluded that Rep. McDermott's disclosure violated his obligations as the Committee's then-Ranking Member, (2) McDermott took the tape from the interceptors with knowledge of their illegal conduct, and (3) the participants in the illegally intercepted conversation had particularly strong expectations of privacy.

2. Whether the House Ethics Committee in fact concluded that McDermott's disclosure violated his obligations as the Committee's then-Ranking Member.

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BRIEF IN OPPOSITION FOR RESPONDENT

COUNTERSTATEMENT

Plaintiff John Boehner, a U.S. Representative from Ohio who was vacationing in Florida, used a cellular telephone to participate in a call with then-Speaker of the House Newt Gingrich and other House Republican leaders. Pet. App. 3a. The conversation concerned a House Ethics Committee investigation of Gingrich. *Id.* John and Alice Martin, a Florida couple, used a police scanner to intercept and record the call, in violation of 18 U.S.C. § 2511(1)(a). Pet. App. 3a.

The Martins delivered their tape recording to the office of then-Rep. Karen Thurman. *Id.* Based on the advice of Stan Brand, a former General Counsel of the House of Representatives, Thurman's office returned the tape to the Martins—in its unopened envelope—and suggested that they give it to the Ethics Committee. *Id.* at 3a-4a.

The Martins then met with Defendant James McDermott, a U.S. Representative from Washington, in an anteroom of the Committee's hearing room. *Id.* at 4a. The Martins handed McDermott the tape in a sealed envelope, along with a letter addressed to "Committee on Standards of Official Conduct . . . Jim McDermott, Ranking Member." *Id.* The letter read:

> Enclosed in the envelope you will find a tape of a conversation heard December 21, 1996 at about 9:45 a.m. The call was a conference call heard over a scanner. We felt the information included were [sic] of importance to the

> committee. We live in the 5th. Congressional District and attempted to give the tape to Congresswoman Karen Thurman. We were advised by her to turn the tape directly over to you. We also understand that we will be granted immunity.
>
> . . . We pray that committee will consider our sincerity in placing it in your hands.
>
> . . .

Id. Regardless whether McDermott read the cover letter, he knew that the Martins had intercepted the call using a scanner. *Id.* at 44a. McDermott knew this because the undisputed evidence establishes that the Martins *told* him so. The *New York Times* reported: "The Congressman . . . quoted the[] [couple] as saying [the tape] had been recorded off a radio scanner, suggesting that one participant was using a cellular telephone." *Id.* at 39a. McDermott does not deny that the Martins, in fact, "told him that they'd gotten the phone call off a radio scanner." Joint Appendix in the Court of Appeals ("J.A.") 73. He says only that, many years later, he "do[es] not remember one way or another." *Id.* Thus, there is literally no dispute over the fact that the Martins told McDermott about the illegal interception.[1]

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[1] Indeed, no judge at any stage of these proceedings found there to be a genuine dispute over the fact that McDermott knew at the time of receiving the tape that it had been recorded with a radio scanner.

After listening to the tape, McDermott invited reporters from the *New York Times* and the *Atlanta Journal-Constitution* to his office, where he allowed them to hear the tape as well. Pet. App. 4a-5a. There was nothing improper about the recorded conversation itself, and McDermott "could not have intended to expose misconduct, since . . . there is no evidence that he was aware of any at the time he made the disclosure." *Id.* at 109a. Instead, McDermott was motivated by an intent to "embarrass" and "politically harm the individuals" on the intercepted call "through an invasion of their privacy." *Id.* at 108a.

McDermott considered the potential illegality of disclosing the tape but failed to consult any authority on the matter. *Id.* at 109a-110a. McDermott insisted to the *Times* reporter that he be identified only as "a Democratic Congressman hostile to Mr. Gingrich." *Id.* at 5a. After the *Times* published a front-page article about the tape, *id.*, McDermott denied to reporters that he knew any more about the tape than was in the newspaper. *Id.* at 88a. But the Martins publicly revealed that they had given the tape to McDermott, and he then sent it to the Ethics Committee and resigned his position on the Committee. *Id.* at 6a.

The Committee's Chairman forwarded the tape to the Department of Justice. *Id.* The Martins were prosecuted under 18 U.S.C. § 2511(1)(a), and they ultimately pled guilty and were fined $500. *Id.* McDermott, on the other hand, sent and publicly released a letter to the Committee Chairman claiming that, by forwarding the tape to the Department of Justice, she had "shameful[ly]"

withheld information from the Committee and had violated the House rules. J.A. 177. Specifically, McDermott claimed that because the tape had been "transmitted to [her] as Committee Chairman for inclusion in the Committee record," she should have treated it as "relevant evidence" that had been "disclosed in a committee investigation." *Id.* at 177-78.

It is undisputed that McDermott's disclosure violated 18 U.S.C. § 2511(1)(c), and that 18 U.S.C. § 2520 entitles Boehner to recovery from McDermott for the violation. Pet. App. 6a. Initially, the district court held that McDermott's First Amendment defense "exploited a loophole" and required dismissal of Boehner's complaint. *Id.* at 81a. The Court of Appeals reversed, holding that McDermott had not "lawfully obtained" the tape—and, thus, had no First Amendment defense—because he had actively and knowingly participated in the Martins' unlawful transmission of the tape to him. *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999).

This Court vacated and remanded for further consideration in light of its intervening decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *Bartnicki* held that § 2511(1)(c)—though it serves "interests of the highest order"—was not "valid[] . . . as applied to the specific facts of [that] case[]." *Id.* at 518, 524. The Court emphasized, among other things, that the tape had been "obtained lawfully" by the defendants because it had been left anonymously in a defendant's mailbox. *Id.* at 525. The Court also distinguished the facts of this case, recognizing that here "the defendant knew both who was responsible for intercepting the conversation and how they had

done it." *Id.* at 522 n.5. The Court of Appeals in turn remanded to the district court for consideration of *Bartnicki's* effect after further development of the record. *Boehner v. McDermott*, 22 F. App'x 16 (D.C. Cir. 2001).

After discovery, the district court granted summary judgment for Boehner. The court ruled that McDermott had received the tape in his official capacity as a Member of the Ethics Committee rather than in his "unofficial political capacity." Pet. App. 74a-77a. The court therefore considered applying *United States v. Aguilar*, 515 U.S. 593 (1995), which held that less stringent First Amendment standards govern prohibitions on disclosure by defendants in sensitive confidential positions. The district court, however, did not rest its decision on *Aguilar*, because it declined to resolve a perceived ambiguity as to whether McDermott had violated his duties as an Ethics Committee member. Pet. App. 78a-79a. The court held instead that McDermott had not "lawfully obtained" the tape, based on the reasoning of the prior Court of Appeals decision, and that "[t]he case at hand is distinguishable from *Bartnicki*" for that reason. *Id.* at 90a.

The district court awarded Boehner $10,000 in statutory damages, $50,000 in punitive damages, and attorneys' fees and costs in an amount to be determined. *Id.* at 111a. The court explained that punitive damages are "appropriate given Defendant's outrageous conduct" in "recklessly" disregarding the law and "malicious[ly]" invading Boehner's privacy in an attempt to inflict political harm. *Id.* at 108a-109a.

A panel of the Court of Appeals affirmed. *Id.* at 42a. The panel reasoned: "[I]t does not follow [from *Bartnicki*] that anyone who receives a copy of [an illegally intercepted] conversation has obtained it legally and has a First Amendment right to disclose it. If that were the case, then the holding in *Bartnicki* is not 'narrow' as the Court stressed, but very broad indeed." *Id.* "On the other hand, to hold that a person who knowingly receives a tape from an illegal interceptor" can be distinguished from the *Bartnicki* defendants "would be to take the Court at its word." *Id.* "It also helps to explain why the Court thought it so significant that the illegal interceptor in *Bartnicki* was unknown, and why the Court distinguished this case on that ground." *Id.* at 42a. (citations omitted). Here, because "McDermott knew the Martins had illegally intercepted the conversation, he did not lawfully obtain the tape from them." *Id.* at 45a.

Judge Sentelle dissented, finding *Bartnicki* controlling. *Id.* at 47a-56a. Judge Sentelle saw no "distinction . . . of constitutional significance" between a person who discovers in his mailbox a tape containing an unlawfully intercepted conversation, as in *Bartnicki*, and a person who willingly accepts a tape from the interceptors with the knowledge that they illegally recorded it, as in this case. *Id.* at 52a-56a.

As the case was pending before the en banc Court of Appeals, the Investigative Subcommittee of the House Ethics Committee issued its Report addressing an ethics complaint filed against McDermott, which was predicated on his disclosure of the tape. *Id.* at

113a. In the detailed, 25-page Report, the bipartisan Committee unanimously stated that it had

> reviewed the applicable Committee rules related to the confidentiality of Committee proceedings and concluded that Representative McDermott's conduct, *i.e.*, his disclosure to the news media of the contents of the tape furnished to him by the Martins, was inconsistent with the spirit of the applicable rules and represented a failure on his part to meet his obligations as Ranking Minority Member of the House Select Committee on Ethics.

Id. at 142a. The Report emphasized that violating the "spirit" of the Committee's rules is a violation of the House rules, because the House rules state that "'[a] Member . . . *shall adhere* to the *spirit* and letter of the Rules of the House and to the rules of the duly constituted Committees thereof.'" *Id.* at 144a n.78 (quoting House Rule 23, clause 2) (emphasis added; alterations in original). The Report further explained that "'a narrow technical reading of a House rule should not overcome its spirit and the intent of the House in adopting that and other rules of conduct.'" *Id.* (quoting House Ethics Manual at 15). The full Committee on Standards of Official Conduct voted to adopt the Report. *Id.* at 146a.

McDermott's brief to the en banc Court of Appeals was due shortly after the Report issued. In his brief, McDermott himself put the Report in issue before the en banc court, and affirmatively argued that the

court should accept the Report's conclusions as he viewed them. D.C. Cir. Appellant's Supp. Br. at 12 (Dec. 22, 2006). McDermott did not contend that the Court of Appeals, in rendering its decision, was barred from adopting the Ethics Committee's findings set forth in the Report.

The en banc Court of Appeals affirmed the judgment against McDermott. Pet. App. 13a. The majority "assume[d] *arguendo* that Representative McDermott lawfully obtained the tape from the Martins." *Id.* at 7a. The majority nonetheless recognized that, under *Aguilar*, "those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information." *Id.* at 10a. This case therefore falls squarely within the framework of *Aguilar*, since McDermott, as a Member of the Ethics Committee, was under a "duty [not] 'to disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee.'" *Id.* (quoting House Ethics Committee Rule 9). Because the House Ethics Committee's Report clearly stated that McDermott's conduct "'was inconsistent with the spirit of the applicable rules and represented a failure on his part to meet his obligations as Ranking Member of the House Select Committee on Ethics,'" *Aguilar* precluded McDermott from using the First Amendment as a shield to liability under the wiretapping statute. *Id.* at 12a-13a (quoting Ethics Committee Report at 17).

In dissent, Judge Sentelle, joined by three other judges, conceded that he could "do little to improve on

the majority's description of" *Aguilar*, but he viewed that decision as "not on point." *Id.* at 27a. The dissent also concluded that the judgment could not be affirmed on the ground that McDermott had not lawfully obtained the tape. *Id.* at 17a-24a. Judge Griffith joined the four dissenters on the "lawfully obtained" issue, but he wrote a concurring opinion to emphasize that "the Court does not and need not reach th[e] issue to resolve the matter before us." *Id.* at 14a. That is because Judge Griffith joined the majority's affirmance based on *Aguilar*, explaining that "McDermott cannot here wield the First Amendment shield that he voluntarily relinquished as a member of the Ethics Committee." *Id.*

REASONS FOR DENYING THE WRIT

I. THE ISSUES IN THIS CASE ARE NEITHER IMPORTANT NOR THE SUBJECT OF CONFLICTING DECISIONS

The Court of Appeals' decision is narrow, fact-bound, and unworthy of review. Indeed, the petition does not even suggest that any of the usual reasons for granting certiorari are present in this case. There is neither a circuit split nor any confusion in the lower courts as to the governing principles. The opinion below did not purport to set forth any generally applicable principle of law, and there is no reason to believe that the decision in this *sui generis* case will affect or govern any cases in the foreseeable future. Thus, even assuming *arguendo* that the reasoning below is erroneous, that fact-bound

decision in circumstances unlikely to recur does not warrant this Court's intervention.

The Court of Appeals resolved McDermott's as-applied challenge to 18 U.S.C. § 2511(1)(c) by focusing on the facts of this case, without relying on any new rule of law or even any rule of general applicability. In the lower court's own words, "[t]he question . . . is whether Representative McDermott had a First Amendment right to disclose to the media this particular tape at this particular time given the circumstances of his receipt of the tape, the ongoing proceedings before the Ethics Committee, and his position as a member of the Committee." Pet. App. 7a. Even under McDermott's broadest characterization, the Court of Appeals relied on an extremely limited principle—that a defendant in a sensitive confidential position not only accepts job-related nondisclosure rules, but also has a diminished First Amendment defense to a general nondisclosure statute. This principle stretches no further than the facts of this case, which are unique on many levels, and are therefore extraordinarily unlikely to recur.

To begin with, the number of people in sensitive confidential positions is quite small. Of that group, only a miniscule subset will deliberately violate special duties of nondisclosure as to information received in those positions. And, within this much smaller group, the category of cases where the disclosure *also* violates a statutory prohibition like the eavesdropping provision is virtually a null set. There have been *no* other such cases in the 40-year history of the eavesdropping statute. In fact, the only other decision involving this scenario under *any*

statute is *United States v. Aguilar*, 515 U.S. 593 (1995). In that case, as explained below, this Court already resolved the narrow question presented here. *See* Pet. App. 11a ("The situation is the same as that in *Aguilar*.").

Moreover, in his unsuccessful attempt to avoid *Aguilar*, McDermott necessarily narrows the issue even further. McDermott "distinguishes" *Aguilar* on the ground that *Aguilar*'s diminution of First Amendment rights for certain public officials applies only if the statute being enforced is "closely connected" (whatever that may mean) to the defendant's sensitive confidential position. Pet. 20 (quoting Pet. App. 28a). The issue argued by McDermott only would be implicated, therefore, if all the above criteria were met *and* the defendant's statutory liability was not "closely connected" to his sensitive confidential position. And, even in this situation, the relevance of the defendant's sensitive confidential position would only potentially need to be reached if the statute's enforceability against private citizens was in doubt.

McDermott does not, and could not, suggest any likelihood that such a confluence of highly unusual facts will materialize again in the future. The Court of Appeals, therefore, was correct in describing the First Amendment issue as unique to this case. The judgment below is "like a restricted railroad ticket, good for this day and train only." *Washington County v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting) (citation and internal quotation marks omitted); *see also Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 74 (1955) (a case

is only potentially worthy of certiorari if it is "beyond the academic or the episodic").

It is obvious even to McDermott's allies below that the narrowness of the Court of Appeals' decision drains this case of any First Amendment significance. Far from supporting McDermott's rhetoric that the Court of Appeals "blasted a gaping hole into" the First Amendment (Pet. 1), the *amici* below "greeted the decision with relief and enthusiasm," claiming that "[i]t's a huge win in terms of the free speech and free press interests." Adam Liptak, *Court Says Congressman Must Pay Damages*, N.Y. TIMES, May 2, 2007, at A1 (internal quotation marks omitted); *accord The McDermott Affair*, WALL ST. J., May 12, 2007, at A10 (editorial by media *amicus*) ("[W]e're pleased to report that an appellate court decision last week left all of us a little freer."). The Court of Appeals' fact-bound rejection of McDermott's First Amendment defense would therefore be unworthy of certiorari even if it were not demonstrably correct (*see infra* Part II).

McDermott's separation-of-powers argument also is unworthy of review. Most importantly, McDermott failed to raise the argument below. He *now* argues that it is "an affront to the separation of powers" to attach "adverse collateral consequences" to the "Ethics Committee Report" determining that he violated a special duty of nondisclosure imposed by House rules. Pet. 24, 28. In the court below, however, he never suggested any problem with examining or attaching consequences to the Report. To the contrary, McDermott *himself* presented the Report to the court and affirmatively argued that his defense should be evaluated based on the Report's

conclusions *as he viewed them.* D.C. Cir. Appellant's Supp. Br. at 11-12 (Dec. 22, 2006). He cannot now be heard to argue that the court below was constitutionally compelled to ignore the Ethics Committee Report that he introduced.

Specifically, in the Court of Appeals, McDermott asserted that, under the circuit precedent of *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), the Court should not "construe the scope of ambiguous duties imposed under Congress' internal rules." D.C. Cir. Appellant's Supp. Br. at 11 (Dec. 22, 2006). Neither McDermott nor the dissenting opinion, however, suggested that it was improper to review a report of Congress concerning its own internal rules; the disagreement was simply over whether the majority was correct in concluding that the "Ethics Committee report on McDermott's conduct removes all ambiguity" about whether he violated House rules. Pet. App. 29a. Accordingly, the question whether it was improper under the separation of powers for a court to interpret a congressional committee's interpretation of congressional rules was never presented or discussed in any way below, and therefore is not properly presented here. *See, e.g., Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 127 S. Ct. 1199, 1207 (2007).

In any event, even if McDermott previously raised the issue that he now seeks to present, it would not be suitable for certiorari. It is exceedingly rare that a court will have any occasion to review congressional rules or determine whether a Member of Congress violated those rules. Nor are the principles governing such judicial review subject to either conflicting

decisions or confusion in the lower courts. In this case, moreover, the Court of Appeals relied upon the Ethics Report rather than its own reading of the rules themselves. Needless to say, a court will rarely, if ever, have an opportunity to review Congress's interpretation of its own rules.

Finally, the issue that *was* preserved below—whether this particular Report leaves any ambiguity concerning this particular defendant's violation of House rules—could not be more case-specific. The majority's disagreement with McDermott and the dissenting opinion concerning whether there is "ambiguity" surrounding McDermott's rules violation is a textbook example of an alleged "error" that is narrow and factual, and thus not reviewed by this Court. *See* SUP. CT. R. 10 (2007) ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

McDermott has identified no aspect of the law that needs to be—or even would be—developed or clarified by this Court's review of the decision below. And his desire to avoid paying $60,000 in damages, plus attorneys' fees, would be an insufficient basis for certiorari even if there were doubt about the

correctness of the Court of Appeals' narrow, fact-bound decision. Accordingly, the petition should be denied. In any event, for the reasons explained below, there was no error. The Court of Appeals properly applied the law to the particularized facts of this case and correctly held that McDermott could not escape liability under the eavesdropping statute.

II. THE COURT OF APPEALS' JUDGMENT IS CORRECT

A. The Statute Is Enforceable Against McDermott Under *United States v. Aguilar*

Unable to identify an issue worthy of review, McDermott resorts to hyperbole and *ad hominem* attacks on the Court of Appeals. Specifically, he contends that *Bartnicki v. Vopper*, 532 U.S. 514 (2001), although not presented with the question, definitively resolved that officials in sensitive confidential positions have precisely the same First Amendment right to disclose illegally intercepted phone calls as the private defendants in that case. Pet. 15-22. That being so, McDermott argues, it is constitutionally irrelevant whether the illicit disclosure was made by an FBI agent or a federal prosecutor or, as here, the Ranking Member of the House Ethics Committee who received the purloined tape in connection with his role in an official investigation. Indeed, McDermott claims that the Court of Appeals' use of this supposedly flimsy distinction actually "flout[s] . . . this Court's authority over constitutional law" and "thereby threatens the hierarchy of the federal court system created by the Constitution and Congress." *Id.* at 15, 23 (internal quotation marks omitted).

Notwithstanding these apocalyptic pronouncements, the rule that illegal disclosures by officials in "sensitive confidential positions" are judged by less "stringent" First Amendment "standards" than disclosures by "unwilling members of the public" is, in fact, mandated by this Court's unanimous opinion in *United States v. Aguilar,* 515 U.S. 593, 606 (1995). The court below's application of this principle hardly "flouts" the fact-specific *Bartnicki* decision; it is, indeed, necessary to avoid "flouting" this Court's decision in *Aguilar.*

Aguilar involved a First Amendment challenge by a federal judge to his conviction under 18 U.S.C. § 2232(c)—a sister provision of § 2511(1)(c)—for disclosing to an acquaintance that he had been listed as a potential interceptee on a wiretap application. *See* 515 U.S. at 595-96. The Court emphasized that Judge Aguilar was not "simply a member of the general public who happened to lawfully acquire possession of information about the wiretap; he was a Federal District Court Judge who learned of a confidential wiretap application from the judge who had authorized the interception, and who wished to preserve the integrity of the court." *Id.* at 605-06. This was significant because "[g]overnment officials in sensitive confidential positions may have special duties of nondisclosure." *Id.* at 606.

Specifically, "[a]s to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards [established in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979)] that would apply to efforts to impose restrictions on unwilling members of the public." 515 U.S. at 606. Thus, even

though the wiretap statute prohibited Judge Aguilar's disclosure of truthful, lawfully obtained information of public importance, the Court unanimously concluded that his claim was so lacking in merit that it did not even raise a "First Amendment concern[]" sufficient to warrant a "narrowing" construction of the statute. *Id.*; *see also id.* at 606-07 (Stevens, J., concurring in part and dissenting in part); *id.* at 609 (Scalia, J., concurring in part and dissenting in part).

Here, "[t]he situation is the same as that in *Aguilar*." Pet. App. 11a. That is because "[w]hen Representative McDermott became a member of the Ethics Committee, he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the Martins' illegal recording." *Id.* at 13a; *see infra* Part II.B. In *Bartnicki*, by contrast, "[t]he individuals who disclosed the tape . . . were private citizens who did not occupy positions of trust." *Id.* at 10a. As a consequence, application of the eavesdropping statute in this case is "not subject to the same stringent standards that . . . appl[ied in *Bartnicki*] to efforts to impose restrictions on unwilling members of the public." *Aguilar*, 515 U.S. at 606. And it is undisputed that enforcement here of the statute, which serves "interests of the highest order," *Bartnicki*, 532 U.S. at 518, easily satisfies the less "stringent" First Amendment test dictated by *Aguilar*.

In short, since the "stringent standards" established by *Daily Mail* for private citizens did not govern Judge Aguilar's violation of 18 U.S.C. § 2232(c), it inexorably follows that the "stringent standards" established by *Bartnicki*'s application of

Daily Mail for private citizens do not govern Rep. McDermott's violation of 18 U.S.C. § 2511(1)(c). In the face of this, Petitioner nevertheless argues that disclosure by sensitive confidential officials are subject to the same "stringent" First Amendment "standards" applied to private citizens if the speech restriction is contained in a generally applicable statute. This is purportedly so because a sensitive confidential official's First Amendment right to disclose is diminished only with respect to the statute or regulation *creating* the nondisclosure duty, but such officials have the same First Amendment rights as private citizens with respect to *other* governmental restrictions on disclosure. This analysis is plainly wrong for a number of obvious reasons.

First, Petitioner's rule is utterly irreconcilable with *Aguilar*. There, Judge Aguilar asserted a First Amendment right to trump application of a generally applicable statute; it was not asserted against application of the judicial regulation that created his special duty of nondisclosure. Thus, it is as clear as can be that the First Amendment rights of sensitive confidential officials are diminished relative to statutes distinct from the regulation prohibiting disclosure and that the constitutionality of such statute's application is to be assessed pursuant to less "stringent standards" than those that normally apply.

Apparently recognizing this, Petitioner beats a tactical retreat and acknowledges that sensitive confidential officials *do*, in fact, have diminished First Amendment rights, not only with respect to the regulation creating the nondisclosure duty, but also

to "*other*" generally applicable laws. Pet. 20. But, we are told, this is true only when the generally applicable "'statute at issue . . . [is] closely connected with the 'special duty of nondisclosure' that limited the defendants' First Amendment rights.'" *Id.* (quoting Pet. App. 28(a)). This attempted narrowing of *Aguilar*, however, is completely without merit.

In the first place, Petitioner's "closely connected" rule is fashioned out of whole cloth—there is no hint in *Aguilar* that relaxation of the "stringent standards" depends on a close nexus between the statute being enforced and the rule creating the nondisclosure duty. Moreover, Petitioner and the dissent below make no attempt to explain what they mean by "closely connected," much less demonstrate its presence in *Aguilar* or its absence here.

To the extent Petitioner's proposed standard is comprehensible, the illegal tape here was very "closely connected" to McDermott's official position. The tape contained a discussion of pending Ethics Committee proceedings against then-Speaker Gingrich. That is why the interceptors gave it to McDermott, the Committee's Ranking Member, in an anteroom off the Committee's hearing room. Indeed, their cover letter stated: "We felt the information included [was] of importance to the committee. . . . We pray that [the] committee will consider our sincerity in placing it in your hands." Pet. App. 4a. In *Aguilar*, by contrast, the wiretap had no connection, close or otherwise, to any official duty of Judge Aguilar; he was told about it at a cocktail party because he had a personal connection to the wiretap's target. *See United States v. Aguilar*, 994 F.2d 609, 612 (9th Cir. 1993). Application of the *Aguilar* rule is

thus even more compelling here than in *Aguilar* itself.

Furthermore, the general purpose of the statutory prohibition in *Aguilar* was no more "closely connected" to the special nondisclosure duty than it is here. The statute in *Aguilar* prohibited disclosure of a wiretap by anyone, not just a judge or other court officer, and was obviously designed to avoid "imped[ing] ongoing undercover investigations." *Id.* at 615. The special nondisclosure duty, on the other hand, applied broadly to all "communications among judges relating to official judicial business," not just wiretap applications or other secret investigative procedures, and was meant to avoid "stifl[ing] discussion among the members of the federal judiciary." *Id.* at 616 (internal quotation marks omitted). These two nondisclosure obligations were thus quite different in purpose and scope, so they were not "closely connected" at all. *Aguilar*, therefore, cannot be distinguished away pursuant to Petitioner's newly invented standard.[2]

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[2] *Aguilar* also cannot be limited on the basis of the Court's observation that: "'[T]he statute here in question does not impose [a] restriction generally, but only upon those who disclose wiretap information in order to obstruct, impede, or prevent the interception.'" Pet. 19 (quoting 515 U.S. at 605); *see* Pet. App. 27a. The statute at issue here likewise does not impose a restriction generally, but only on those who disclose intercepted communications with knowledge or reason to know of the unlawful interception. 18 U.S.C. § 2511(1)(c). More important, *Aguilar* makes clear that First Amendment standards are *always* less stringent when disclosure restrictions are applied to those who acquire information through their sensitive confidential positions. 515 U.S. at 606.

More generally, Petitioner's assertion that the same First Amendment standards governing "unwilling members of the public" should be applied to confidential public officials conflicts with the Court's general First Amendment approach, makes no sense, and would substantially frustrate important privacy interests. It makes perfect sense to find that public officials have less "freedom" to disclose confidential material than private citizens, regardless of whether the issue arises in connection with enforcement of the specific nondisclosure duty or of a generally applicable statute. Sensitive confidential officials have voluntarily relinquished any "right" to disclose information that comes to them in the course of their job because, by accepting the position of trust, they have willingly subjected themselves to the requirement that such information cannot be disclosed. Since people like McDermott therefore have no First Amendment right to disclose, "he has no shield from [the] civil liability" imposed by the statute any more than he has a shield from "discipline imposed by the House." Pet. App. 11(a); *see id.* at 14(a) (Griffith, J., concurring) ("[B]ecause Rep. McDermott cannot here wield the First Amendment shield that he voluntarily relinquished as a member of the Ethics Committee, . . . his disclosure of the tape-recording was not protected by the First Amendment."). One cannot trump imposition of a federal statute if one does not possess a constitutional right superior to that statute. In short, since confidential public officials are not similarly situated to "unwilling members of the public" with respect to *access* to confidential information, they should not be treated the same

with respect to their willful *disclosure* of such information.

Contrary to McDermott's unsupported hyperbole, nothing in logic or law requires courts to ignore a defendant's independent nondisclosure duties in assessing whether a federal statute may be constitutionally applied to the official. Even McDermott acknowledges elsewhere that First Amendment analysis *is supposed to* turn on the individual defendant's circumstances, such that "a particular restriction [may be] unconstitutional as applied to [one defendant], even if that restriction would not be unconstitutional as applied to someone else." Pet. 18. One key factor in that individualized inquiry is whether the particular defendant voluntarily assumed a responsibility not to disclose the information at issue.

Thus, the principles established for private citizens have never been thought to apply to people in sensitive confidential positions. For example, the fact that a private citizen has a First Amendment right to disclose a rape victim's name hardly suggests that *police officers*, who obtain such information by virtue of their sensitive confidential positions, have an analogous right. *See Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (the "government *may* . . . extend a damages remedy *against* the government or its *officials* where the government's mishandling of sensitive information leads to its dissemination") (emphasis added). Similarly, the fact that a grand jury *witness* has a right to disclose grand jury testimony, *see Butterworth v. Smith*, 494 U.S. 624 (1990), hardly suggests that a grand juror or prosecutor has a similar right, *see id.* at 631-32. And

if *Aguilar* had been preceded by a decision invalidating the wiretap statute's application to an "unwilling member[] of the public," the Court still would have held that Judge Aguilar had no such right to disclose. 515 U.S. at 605.

By the same token, *Bartnicki*'s resolution of the First Amendment rights of the private defendants there hardly governs the rights of a sensitive confidential official like McDermott. This is particularly obvious because, at every turn, *Bartnicki* emphasized that it was not formulating generally applicable principles, but rather, "'limited principles that sweep no more broadly than the appropriate context of the instant case.'" 532 U.S. at 529 (quoting *Florida Star*, 491 U.S. at 532-33); *accord id.* at 524; *id.* at 529 ("[W]e consider whether, given the facts of these [consolidated] cases, the interests served by § 2511(1)(c) can justify its restrictions on speech."). Moreover, two of the six Justices in the *Bartnicki* majority stated that they "agree[d] with the Court's holding that the statutes as applied here violate the Constitution, but [they] would not extend that holding beyond these present circumstances." *Id.* at 541 (Breyer, J., concurring). On its face, therefore, *Bartnicki's* invalidation of the eavesdropping statute's application did not extend beyond the circumstances of that case, which involved only private defendants.

Indeed, *Bartnicki* affirmatively stated that it was not resolving whether information protected by another nondisclosure duty, independent of § 2511(1)(c), such as "trade secrets," could constitutionally be protected from disclosure under that statute. *Bartnicki*, 532 U.S. at 533-34. Even

more obviously, the opinion did not apply to all defendants regardless of how they obtained the intercepted phone call; it certainly did not purport to protect disclosures by persons, such as the Martins, who obtained the information through an illegal interception. *A fortiori*, *Bartnicki* did not resolve whether information protected by a nondisclosure duty, far more important than "trade secrets," could be disclosed by a defendant like McDermott, who obtained the information because of a sensitive confidential position and in circumstances where he was obliged to keep that information confidential.

All agree that a public official's voluntary acceptance of special responsibilities and the government's strong interest in conducting important investigatory and other functions in confidence, standing alone, suffices to allow draconian punishment of such officials when done to enforce the nondisclosure duty itself. There is simply no reason that those same compelling public interests and equitable concerns should be ignored in assessing the constitutionality of enforcing a statute against sensitive confidential officials.

In sum, the Court of Appeals' faithful application of *Aguilar* is perfectly consistent with this Court's decision in *Bartnicki*.

B. McDermott's Separation-Of-Powers Arguments Are Meritless

As stated above, McDermott's separation-of-powers arguments are unworthy of review. His current challenge to judicial recognition of a House rules violation was not presented below, and his disagreement with the Court of Appeals' reading of

the Ethics Report applies only to this one case. Furthermore, even assuming away these defects in the petition, there is no merit in McDermott's challenge to the Court of Appeals' recognition of a special nondisclosure duty here. Any concern about interpreting ambiguous rules is irrelevant because the Court of Appeals did nothing more than adopt the conclusions of the Ethics Report. And the court's reading of the Report was entirely correct.

McDermott's assertion that "the Judicial Branch is not in the business of adjudicating—much less punishing—violations of the internal rules of the Legislative Branch" (Pet. 2) is a non sequitur. There was no occasion in this case for the court below to interpret the House rules or adjudicate a violation, because the House Ethics Committee *already* concluded in the Report that McDermott violated his ethical obligations. *See infra* pp. 28-32. Nor did the court "punish" McDermott for *that* violation. As the court made clear, McDermott's "civil liability . . . rest[s] not on his breach of some ethical duty, but on his violation of a federal statute for which he had no First Amendment defense." Pet. App. 12a; *accord* Pet. 16 ("No one here is trying to punish Rep. McDermott under the House Ethics Committee Rules . . . Rep. Boehner is trying to punish Rep. McDermott for violating the duty of nondisclosure in [a] statute.").

In short, the court below adjudicated and enforced a federal statute, not any House rule. In the course of that analysis, it resolved McDermott's affirmative First Amendment defense, which necessitated determining whether he was subject to special nondisclosure duties under the Ethics Committee

rules. Nothing in the separation of powers prevents a court from taking cognizance of House rules, much less the House's interpretation of its own rules, to resolve a case properly before it.

As this Court explained in *Yellin v. United States*, 374 U.S. 109, 114 (1963), "[i]t has long been settled . . . that rules of Congress and its committees are judicially cognizable." Thus, "it is perfectly clear that the Rulemaking Clause is not an absolute bar to judicial interpretation of the House Rules." *Rostenkowski*, 59 F.3d at 1305. For example, where a defendant's liability for embezzlement turns on whether his use of funds was authorized by his employer, "the House Rules are necessary and proper evidence to make that showing" against a Member of Congress. *Id.* It is no different if a defendant's statutory liability turns on whether he accepted diminished First Amendment protections by assuming a sensitive confidential position.

In a variety of other contexts, one unit of government accepts or interprets another's rules without overstepping the lines that delineate their separate domains. The Executive Branch did not invade the judiciary's Article III domain when it prosecuted Judge Aguilar under a wiretap statute and took account of judicial confidentiality rules to refute his First Amendment defense. Similarly, no affront to coordinate branches has occurred in the legion of cases where the courts, in deciding whether a public employee's speech is protected by the First Amendment, have considered nondisclosure obligations, other workplace rules, and the scope of official duties. *See, e.g.*, *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465 (1995);

see also Garcetti v. Ceballos, 126 S. Ct. 1951, 1961-62 (2006).

Nor does McDermott's proposed rule make any sense or in any way further respect for a coordinate branch. Under his view, even if it is conceded or absolutely clear that congressional rules prohibited a defendant's conduct, a court must act as if the rules plainly *authorized* the conduct. It is difficult to imagine a more perverse form of deference to a coordinate branch. Judicially approving or permitting behavior that the House rules condemn reflects just as much disrespect to Congress as condemning behavior that the House rules approve or permit.

Members of Congress do not have a special exemption under which they, unlike anyone else, can compel courts to act as if their misconduct was internally authorized. *See Rostenkowski*, 59 F.3d at 1305 ("Indeed, if Rostenkowski's argument were accepted it would effectively insulate every Member of Congress from liability under certain criminal laws."); *United States v. Durenberger*, 48 F.3d 1239, 1244 (D.C. Cir. 1995); *United States v. Diggs*, 613 F.2d 988, 994-96, 1001 (D.C. Cir. 1979). The particular circumstances of this case serve to emphasize the point. Congress's need to ensure that officials preserve its secrets and deliberations would be extremely *frustrated* if the judiciary abdicated its responsibility to enforce laws prohibiting disclosure, simply because the defendant was a Member of Congress.

In any event, any conceivable separation-of-powers concern disappears altogether where, as here, the

court defers to a specific determination by Congress of the internal rules' applicability. To the extent that courts should be reluctant to interpret ambiguous House rules, it is because "there is too great a chance that it will interpret the Rule differently than would the [House] itself." *Rostenkowski*, 59 F.3d at 1306. Such a divergence in interpretations is obviously impossible when the court simply adopts the findings of Congress. Thus, in *Powell v. McCormack*, 395 U.S. 486 (1969), the Court did not undermine legislative autonomy when it accepted the Speaker of the House's ruling that the resolution at issue was for exclusion rather than expulsion, emphasizing that "[w]e must reject respondents' suggestion that we overrule the Speaker." *Id.* at 511-12. Analogously, federal courts do not interfere with state courts' plenary authority to interpret state law by examining and applying those courts' decisions. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

Here, there was no need for the Court of Appeals to interpret the rules, because the entity specifically charged with determining compliance—the Ethics Committee—had already done so with respect to McDermott's disclosure. The issuance of the Report "thereby eliminate[d] the concerns" about interpreting ambiguous House rules. Pet. App. 13a. Respect for a co-equal branch obviously does not counsel in favor of *rejecting* the coordinate branch's conclusions regarding its own internal affairs.

Nor was there any flaw in the Court of Appeals' reading of the Report, even assuming this case-specific fact were of interest to this Court. In its

Report, the bipartisan Committee unanimously stated that it had

> reviewed the applicable Committee rules related to the confidentiality of Committee proceedings and concluded that Representative McDermott's conduct, *i.e.*, his disclosure to the news media of the contents of the tape furnished to him by the Martins, was inconsistent with the spirit of the applicable rules and represented a failure on his part to meet his obligations as Ranking Minority Member of the House Select Committee on Ethics.

Pet. App. 142a.

Thus, the Report squarely found that McDermott, by engaging in "disclosure to the news media," failed "to meet his *obligations* as Ranking Minority Member of the House Select Committee on Ethics." *Id.* (emphasis added).[3] If, as McDermott maintains, he had no obligation to keep the tape confidential, then his "disclosure" could not have demonstrated his "failure . . . to meet his obligations" "related to the confidentiality of Committee proceedings." Of course, a Member has an "obligation" to engage in conduct only if that conduct is *required* by the Committee's rules.

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[3] McDermott's attempt to distinguish between his obligations as Member and Ranking Member (Pet. 26) is meritless. His nondisclosure obligations as Ranking Member were no different than his obligations as a Member.

Contrary to Petitioner's central premise, the fact that the Committee stated that he had also violated the "spirit of applicable rules" in no way suggests that it believed McDermott innocent of a rules violation. As the Ethics Committee Report expressly noted, the House rules plainly state that "'[a] Member . . . *shall adhere* to the *spirit* and letter of the Rules of the House and to the rules of the duly constituted Committees thereof.'" *Id.* at 144a n.78 (quoting House Rule 23, clause 2) (emphasis added; alterations in original). Thus, McDermott's violation of the "spirit of the . . . rules" was a violation of those rules under House Rule 23. Any delicacy in the Committee's phrasing of McDermott's rules violation—perhaps in order to ensure the support of all of McDermott's Democratic colleagues on the Committee—at most reflects that it was simply immaterial whether the letter or spirit was violated.[4]

In all events, there is no ambiguity even in the text of the rules. McDermott now alleges that "the tape at issue here was not 'evidence' in the Gingrich investigation," Pet. 26 n.2, but he previously admitted in a public letter to the Committee Chairman that the tape contained "evidence . . . disclosed in a committee investigation." J.A. 177-78.

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[4] By analogy, judicial ethics or recusal opinions simply state that the challenged judge's actions create an "*appearance* of impropriety" because that standard, like the "spirit" standard in the House, is the relevant test. In such circumstances, the failure to affirmatively find that the judge's actions were *actually* improper does not constitute an implicit finding that the judge's actions were "proper," but reflects only that there was no need to use stronger language because an apparent impropriety is just as much a violation as an actual impropriety.

Furthermore, the rules prohibit disclosure not only of "evidence," but of "*any* information regarding the Committee's or a subcommittee's . . . proceedings" and "*[a]ny* other information or allegation respecting the conduct of a Member." Rule 10(b), Committee on Standards of Official Conduct, U.S. House of Representatives (1995) (J.A. 180) (emphasis added). Finally, contrary to McDermott's other argument, the rules' prohibition on disclosure *to* persons "outside the Committee" in no way creates a bizarrely limited nondisclosure requirement that somehow exempts information received *from* persons "outside the Committee," *i.e.*, virtually all information used by the Committee. Thus, the Report could not have reached any other conclusion because the rules are clear.[5]

Finally, it is irrelevant that the Committee decided against "further proceedings." Pet. App. 145a. This reflects only a decision to refrain from imposing sanctions for the violation found; it does not suggest that a violation was not found.[6]

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[5] The rules' lack of ambiguity also shows that even if no Report had been issued, the separation of powers would not be violated by recognition that the rules prohibited McDermott's disclosure. Thus, assuming *arguendo* that the Ethics Report for some reason should be disregarded, there is an alternative ground for affirming the judgment below, which makes this case a particularly poor vehicle for considering a separation-of-powers challenge.

[6] McDermott is wrong in claiming (Pet. 26) that the Subcommittee lacked authority to find a violation without issuing a Statement of Alleged Violation. It is clear that a formal Statement of Alleged Violation is a purely discretionary document that an investigative subcommittee "*may* adopt" when it finds a violation. Rule 19(f), Committee on Standards of Official Conduct, U.S. House of Representatives, 109th Congress

In sum, McDermott's separation-of-powers argument, like his First Amendment argument, neither warrants this Court's review nor is meritorious.

C. The Court of Appeals' Judgment Also Is Correct On Other Grounds

Even if the issues presented in the petition were worthy of review, this case would be a poor vehicle for resolving them because the rationale below is only one of three meritorious grounds for rejecting McDermott's First Amendment defense.

In addition to the reason adopted below, *Bartnicki*'s analysis is inapposite because, unlike the *Bartnicki* defendants, McDermott did not "lawfully obtain" the tape. *Bartnicki*, 532 U.S. at 525. In *Bartnicki*, the Court emphasized that "respondents played no part in the illegal interception," and, *in*

(2005-06) (emphasis added). Indeed, the Committee may, without even convening an investigative subcommittee, adopt a conclusion of the Chairman and Ranking Member that "the respondent's conduct . . . violates . . . House Rules or standards of conduct, but the circumstances . . . indicate that a formal investigation is not warranted." Memorandum to Committee from Chairman and Ranking Member, *available at* http://www.house.gov/ethics/DeLay_memo.htm (last visited Oct. 25, 2007); *see* Rule 16, Committee on Standards of Official Conduct, U.S. House of Representatives, 109th Congress (2005-06). Even if there were ambiguity on this point, moreover, "[t]he Committee necessarily believed that it had authority to act as it did," and "the rules of a particular committee are for that committee to interpret." Pet. App. 13a n.7 (internal quotation marks omitted).

addition, "their access to the information on the tape was obtained lawfully." *Id.* One of the defendants had found the tape in his mailbox, and the remaining media defendants obtained recordings directly or indirectly from him. *Id.* at 519. Thus, "[n]o one claim[ed] that they ordered, counseled, encouraged, or otherwise *aided or abetted* the interception, *the later delivery of the tape by the interceptor to an intermediary*, or the tape's still later delivery by the intermediary to the media." *Id.* at 538 (Breyer, J., concurring) (emphasis added).

Here, by contrast, the Martins "could not have completed their disclosure without the active assistance of McDermott," who not only directly participated in their illegal disclosure, but also did so at a time when he "knew the Martins had illegally intercepted the conversation." Pet. App. 90a; *id.* at 45a. On this basis, the *Bartnicki* Court expressly distinguished this case: "In the *Boehner* case, as in this suit, a conversation over a car cell phone was intercepted, but in that case the defendant knew both who was responsible for intercepting the conversation and how they had done it." 532 U.S. at 522 n.5.

As the Court of Appeals panel recognized, the distinction between McDermott and the *Bartnicki* defendants is important, sensible, and "plain to see":

> It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is

> guilty of receiving stolen property, even if the ring was intended only as a gift.

Pet. App. 46a-47a. Moreover, "Representative McDermott's complicity constituted aiding and abetting [the Martins'] criminal act [of disclosure], or the formation of a conspiracy with them, or," at the very least, "amounted to participating in an illegal transaction." *Id.* at 45a-46a (footnotes omitted). Under any of these characterizations, McDermott did not "lawfully obtain" information in any meaningful sense. Accordingly, even if McDermott were a private citizen, the *Bartnicki* standard would not apply here.

In any event, even if *Bartnicki*'s more stringent test governed here, McDermott would still lose under it. Even if not independently dispositive, McDermott's direct participation in the illegal transaction with the interceptors and his status as a sensitive confidential official would enhance the government's interest in prohibiting his disclosure. Equally important, the content of the intercepted conversation, in stark contrast to the threats of physical harm in *Bartnicki*, demonstrates that application of the statute here furthers a particularized and compelling interest. The intercepted call was a private conversation among leaders of Congress about congressional business, so the Speech or Debate Clause prohibits its disclosure in any forum. U.S. CONST. art. I, § 6, cl. 1. That clause confirms that the interest in maintaining the privacy of these communications, like other privileged information such as "trade secrets" or attorney-client communications, surpasses any interest in public disclosure. *See Bartnicki*, 532 U.S.

at 533 (stating that the holding did not extend to disclosure of "trade secrets"). These factors in combination certainly distinguish the fact-specific *Bartnicki* holding and decisively tip the balance in favor of upholding the application of the statute in these unusual circumstances.

In addition to confirming the correctness of the Court of Appeals' judgment, these points highlight that the questions presented in the petition do not resolve this case and might well not even be reached. At the very least, because there are several different, fatal flaws in McDermott's First Amendment defense, there would be a real possibility of affirmance without agreement by a majority of the Court on the appropriate rationale—especially given the Chief Justice's recusal. This provides yet another reason to deny certiorari here.

CONCLUSION

The petition should be denied.

Respectfully submitted,

VICTORIA DORFMAN
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

MICHAEL A. CARVIN
Counsel of Record
LOUIS K. FISHER
CHRISTOPHER S. PERRY
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Respondent

October 31, 2007

No. 07-439

IN THE

Supreme Court of the United States

JAMES A. MCDERMOTT,

Petitioner,

v.

JOHN A. BOEHNER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

FRANK CICERO, JR., P.C.
KIRKLAND & ELLIS LLP
200 East Randolph Dr.
Chicago, IL 60601

CHRISTOPHER LANDAU, P.C.
Counsel of Record
EDWIN JOHN U
PADRAIC B. FENNELLY
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

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REASONS FOR GRANTING THE WRIT

I. The Decision Below Warrants This Court's Review.

Rep. Boehner first argues that this Court's review is unwarranted, wholly apart from the merits of the decision below, on the ground that (1) "the issues in this case are n[ot] important," and (2) there is no "confusion in the lower courts as to the governing principles." Opp. 9 (capitalization modified). He is wrong on both scores.

As to importance, this Court already has recognized that the First Amendment issue presented here is "important," *Bartnicki v. Vopper*, 532 U.S. 514, 517 (2001), and the D.C. Circuit only confirmed that point by taking the case *en banc* (and hearing *en banc* oral argument not once but twice). And, as highlighted in the *amicus* brief submitted by several leading Members of Congress, the *en banc* D.C. Circuit's resolution of that First Amendment issue gives rise to an equally important separation of powers issue. Certainly, Rep. Boehner's determination to litigate this case for almost a decade belies his current suggestion that the constitutional issues involved here are not "important."

As to confusion in the lower courts, the dueling 5-4 majorities on the *en banc* D.C. Circuit obviously refute Rep. Boehner's suggestion that the law in this area is clear. Five judges of that court concluded that Rep. McDermott "lawfully obtained" the tape from the Martins within the meaning of *Bartnicki*, *see* Pet. App. 17-24a, whereas four other judges concluded that he did not, *see* Pet. App. 7a n.1. But a different five-judge majority concluded that Rep. McDermott still could be punished under the federal wiretapping statute, notwithstanding *Bartnicki*, on the ground that he violated an internal House rule, *see* Pet. App. 7-13a, whereas four other judges concluded that this point was legally irrelevant as well as incorrect, *see* Pet. App. 24-30a. Given that the *en banc* D.C. Circuit produced two different 5-4 majorities in this

case, Rep. Boehner's assertion that "the governing principles" here are settled, Opp. 9, rings hollow.

Accordingly, Rep. Boehner misses the point by insisting that certiorari is unwarranted because there is no "circuit split" on the issues presented in the petition. Opp. 9. Circuit splits are not meaningful in and of themselves; they are meaningful to the extent they highlight lower-court confusion warranting this Court's guidance. But a divided *en banc* decision often highlights such confusion too, and to that extent warrants review even absent a circuit split. *See, e.g., Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2749 (2007); *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939 (2007); *Zuni Public Sch. Dist. No. 89 v. Department of Educ.*, 127 S. Ct. 1534, 1540 (2007); *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 427 (2006). If the *en banc* D.C. Circuit cannot agree on what *Bartnicki* means, the time has come for this Court to clarify that decision. Indeed, as one prominent commentator recently noted, "[t]he decision in *Bartnicki v. Vopper* raised at least as many questions as it answered, including what is meant by material 'lawfully obtained,' and what types of persons fall inside or outside the contours of the holding." Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 25:45.60 (2007).[1]

In any event, this Court in the past has not waited for a circuit conflict (or even a divided *en banc* decision) to address important constitutional questions involving the

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[1] Rep. Boehner himself underscores this point, at the very end of his brief, *see* Opp. 32-35, by trying to distinguish *Bartnicki* on a variety of grounds rejected by the majority of the *en banc* court below, *see* Pet. App. 14a (Griffith, J., concurring); *id.* at 17-24a (Sentelle, J., dissenting), and subsequently by the First Circuit, *see Jean v. Massachusetts State Police*, 492 F.3d 24, 32 (1st Cir. 2007).

First Amendment or the separation of powers. *See, e.g.*, *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 54 (2006); *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 376-77 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 9 (2004); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 159 (2002); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 566 (1995); *Nixon v. United States*, 506 U.S. 224, 228 (1993); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991); *Ward v. Rock Against Racism*, 491 U.S. 781, 789-90 (1989). Indeed, *United States v. Aguilar*, 515 U.S. 593 (1995)—the case upon which Rep. Boehner bases his entire First Amendment argument—involved no such circuit conflict. The Supreme Court of the United States, not a fractured *en banc* D.C. Circuit, should have the last word on these important constitutional issues.

Rep. Boehner insists, however, that cases involving First Amendment protection for those who violate a special duty of nondisclosure are rare and unlikely to recur. *See* Opp. 9-12. He bases that argument on the assertion that "the number of people in sensitive confidential positions is quite small." Opp. 10. But that assertion, for which he provides no support, is simply not true. Rep. Boehner himself insists that *all* "public officials" fall into that category, on the ground that they "accept[ed] a position of trust." *Id.* at 21. Moreover, many people in the private sector labor under duties of nondisclosure; indeed, it is hard to imagine any employee who does *not* labor under such a duty, at least with respect to information relating to his employer's business. Under the decision below, anyone who violates such a duty, whether knowingly or unknowingly (including whistleblowers), may be punished not only for that violation, but also under *any* other criminal or civil law

without any First Amendment defense whatsoever.[2] Rep. Boehner may believe that this state of affairs is fine and good, but he cannot deny that the decision below has broad ramifications.

Finally, Rep. Boehner argues that this Court's review is unwarranted because the divided *en banc* decision below "did not purport to set forth any generally applicable principle of law." Opp. 9. That is truly a remarkable assertion, given that the very premise of the rule of law is that courts apply generally applicable principles of law to all who come before them, and do not devise special rules for particular litigants. Especially where, as here, the litigants are political figures, courts must be especially scrupulous to abide by generally applicable principles of law to avoid even the appearance of partiality. If anything, thus, Rep. Boehner's characterization of the decision below as "a restricted railroad ticket, good for this day and train only," Opp. 11 (internal quotation omitted), only raises a red flag.

Moreover, it is simply not true that the *en banc* decision below "did not purport to set forth any generally applicable principle of law." Opp. 9. To the contrary, that decision rests on the radical and far-reaching principle that if particular speech may be punished under *some* law without violating the First Amendment, then that speech

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[2] Indeed, under this view, there is no reason (other than *Bartnicki*) why the nondisclosure duty in the federal wiretapping statute itself should not suffice to trump the First Amendment—as Judge Randolph insisted before *Bartnicki*. *See Boehner v. McDermott*, 191 F.3d 463, 477 (D.C. Cir. 1999) (opinion of Randolph, J.) ("McDermott ... obtained the tape under a duty of nondisclosure. In his case the duty arose from a statute—§ 2511(1)(c)."); *see also id.* at 478 ("[McDermott] had a duty ... of nondisclosure. The duty stemmed of course from every citizen's responsibility to obey the law, of which § 2511(1)(c) is a part.") (opinion of Randolph, J.).

may be punished under *any* law without violating the First Amendment. *See* Pet. App. 11a ("If the First Amendment does not protect Representative McDermott from House disciplinary proceedings, it is hard to see why it should protect him from liability in this civil suit."); *id.* ("Either he had a First Amendment right to disclose the tape to the media or he did not."). Indeed, that principle is the very linchpin of the *en banc* majority's analysis, as it is the sole ground on which the majority purported to distinguish *Bartnicki*. Not surprisingly, Rep. Boehner devotes the bulk of his brief to defending that principle on the merits, *see* Opp. 15-24, which obviously refutes his assertion that this case does not involve "any generally applicable principle of law," Opp. 9.

In addition, the separation of powers issue created by the *en banc* majority's resolution of the case is important in its own right. The majority seized on language in an Ethics Committee Report that *terminated* a charge against Rep. McDermott without even referring the matter to an Adjudicatory Subcommittee as a supposedly conclusive adjudication that he violated a nondisclosure duty. *See* Pet. App. 12-13a. The circumstances under which the Judicial Branch may rely on internal reports of the Legislative Branch to punish a member of the Legislative Branch obviously represents an important issue that implicates relations between the Branches. As the *amici* Members of Congress explain, "Congress must be able to conduct its legislative affairs, and to discipline its members, without fear that those members who are dissatisfied with the outcomes of the political process will seek to undermine it, and indeed to achieve a more permanent victory than the political process allows, in the nation's courts." Br. of Reps. Berman, Frank, Lofgren & Miller as *Amici* in Support of Petr. ("*Amici* Br.") 14.

II. The Decision Below Is Wrong.

Rep. Boehner next argues that the *en banc* decision below is correct, both in its limitation of *Bartnicki* and in

its conclusion that the House Ethics Committee unequivocally adjudicated a violation of an internal House nondisclosure rule. *See* Opp. 15-35. Rep. Boehner is wrong on both scores.

A. The First Amendment Issue

Rep. Boehner asserts that this Court's decision in *Aguilar* is the beginning and the end of the First Amendment analysis in this case, and "mandate[s]" the result below. Opp. 16. In particular, he insists that *Aguilar* justifies the D.C. Circuit majority's conclusion that if particular speech may be punished under *some* law without violating the First Amendment, then that speech may be punished under *any* law without violating the First Amendment. *See* Opp. 15-24.

If anything, that argument only underscores why certiorari is warranted here. If indeed Rep. Boehner's broad reading of *Aguilar* is correct—and, to be fair, it was embraced by a majority of the *en banc* D.C. Circuit—then it highlights a doctrinal anomaly in this Court's First Amendment jurisprudence. As noted in the petition, such a broad reading of *Aguilar* conflicts with an otherwise solid wall of precedent holding that whether a particular limitation on speech violates the First Amendment depends on the nature of the particular limitation, not on the nature of the speech. Indeed, that is the very lesson of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In that case, this Court held that even speech that could be proscribed outright without violating the First Amendment (there, "fighting words") could not be proscribed in a content- and viewpoint-discriminatory manner. *See id.* at 391-93. The greater power to proscribe certain speech, in other words, does not include the lesser power to proscribe that speech in any manner whatsoever, and does not render such speech invisible to the First Amendment. Or, as this Court more recently put it, "[t]he fact that a law is capable of valid applications does not necessarily mean that it is valid as

applied to these litigants." *FEC v. Wisconsin Right To Life, Inc.*, 127 S. Ct. 2652, 2670 n.8 (2007) (internal quotation omitted); *see also* Pet. 17-19 (citing other cases).

The broad interpretation of *Aguilar* embraced by Rep. Boehner and the *en banc* majority below cannot be squared with this line of authority. Indeed, neither Rep. Boehner nor the *en banc* majority below even *attempts* to do so. Rather, they simply insist that *Aguilar* says what it says and no further inquiry is necessary or appropriate. In particular, the opposition brief makes no attempt to address or distinguish any of these other cases, but simply insists that *Aguilar* stands for the proposition that if Rep. McDermott constitutionally may be punished for violating a House nondisclosure duty, then he has "no First Amendment right to disclose," Opp. 21, and constitutionally may be punished for violating *any* nondisclosure duty, including a duty that is otherwise unconstitutional. For present purposes, the key issue is not whether Rep. Boehner is right or wrong on this score, but that if he is right, then *Aguilar* is a truly radical decision that creates internal incoherence in this Court's First Amendment jurisprudence that warrants clarification. *See, e.g., Freedom from Religion Found., Inc. v. Chao*, 447 F.3d 988, 988 (7th Cir. 2006) (Flaum, C.J., concurring in denial of rehearing en banc) ("[T]he obvious tension which has evolved in this area of jurisprudence ... can only be resolved by the Supreme Court."), *rev'd*, 127 S. Ct. 2553 (2007).

In any event, as Judge Sentelle (joined by Judges Rogers, Tatel, and Garland) noted in dissent below, it is neither necessary nor appropriate to read *Aguilar* in such a broad and destabilizing manner. *See* Pet. App. 27-28a. *Aguilar* simply reaffirmed the proposition that "[a]s to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." 515 U.S. at 606 (citing *Snepp v. United States*,

444 U.S. 507 (1980) (*per curiam*)). Here, of course, Rep. Boehner is not seeking to punish Rep. McDermott for violating a "voluntarily assumed ... duty of confidentiality," *id.*, but instead for violating the nondisclosure duty in the federal wiretapping statute—the very duty that *Bartnicki* held to violate the First Amendment as applied to persons (like Rep. McDermott) not involved in illegal wiretapping.

Properly understood, thus, *Aguilar* does not conflict with *R.A.V.* or any of the other cases cited above. It is only when *Aguilar* is read to override First Amendment decisions like *Bartnicki* that doctrinal incoherence results. Thus, by insisting that *Aguilar*, not *Bartnicki*, governs the First Amendment analysis here, Rep. Boehner only confirms that the *en banc* D.C. Circuit's 5-4 split on this issue warrants this Court's review.

B. The Separation Of Powers Issue

Rep. Boehner responds to the separation of powers issue by asserting, as an initial matter, that this issue does not warrant review because it "was not presented below." Opp. 24; *see also id.* at 12-13. That assertion misses the mark. Here, the separation of powers issue *results* from the way the *en banc* D.C. Circuit resolved the case by reference to the House Ethics Committee Report. *See* Pet. App. 12-13a. Needless to say, Rep. McDermott could not have challenged the *en banc* D.C. Circuit's interpretation of that Report before the *en banc* D.C. Circuit interpreted the Report in the first place.[3] Because

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[3] Indeed, the Report was not even released until after the first *en banc* argument below. At that point, Rep. McDermott filed a supplemental brief noting that the Report only "confirm[ed]" his position that the Ethics Committee rules did not unambiguously cover the disclosure at issue, and hence had no conceivable bearing here. Supp. Br. for Appellant (12/22/06), at 10; *see also id.* (noting that the Report "expressly *refrained* from concluding that Rep. McDermott had violated any duty of

(as Rep. Boehner concedes, *see* Opp. 25, 28-32) the *en banc* majority based its decision on its interpretation of the Report, that interpretation is squarely presented for this Court's review. As a matter of law, an issue is properly presented here if it was decided by the court below. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citing cases).

Contrary to Rep. Boehner's suggestion, nothing in the petition suggests that the D.C. Circuit was "constitutionally compelled to ignore" the Ethics Report. Opp. 13. Rather, the constitutional problem here stems from the *en banc* majority's reliance on the Report to "punish[] a Member of Congress," Pet. i, or otherwise "attach adverse collateral legal consequences" to his conduct, *id.* at 24. As explained in the petition, and as highlighted below by Rep. McDermott and the *en banc* dissent, *see* Pet. App. 29-30a, the Report only confirms that the *en banc* majority had no basis for concluding that Rep. McDermott violated an internal House rule.

The *en banc* majority concluded otherwise only by asserting, as does Rep. Boehner, that the Report "eliminate[s]" any ambiguity whatsoever about whether Rep. McDermott violated a nondisclosure duty to the House Ethics Committee. Pet. App. 13a; *see also* Opp. 25 ("Any concern about interpreting ambiguous rules is irrelevant because the Court of Appeals did nothing more than adopt the conclusions of the Ethics Report."); *id.* at 27-28 ("[A]ny conceivable separation-of-powers concern disappears altogether where, as here, the court defers to a specific determination by Congress of the internal rules'

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confidentiality") (emphasis in original); *id.* at 11 ("The Committee's careful phrasing, at the very least, leaves calculated ambiguity on this issue, and this Court is not in the business of construing the scope of ambiguous duties imposed under Congress' internal rules.").

applicability."). That assertion, however, only shows that both the *en banc* majority and Rep. Boehner interpret separation-of-powers "ambiguity" so narrowly as to be nonexistent. If this Report is not even "ambiguous" on whether Rep. McDermott violated a House nondisclosure duty, it is hard to know what would be.

In particular, as the *amici* Members of Congress underscore, the Report "reflected a nuanced political compromise among competing interests." *Amici* Br. 8. By using "deliberately crafted language" to resolve the matter, the Report "stake[d] out a flexible, and politically viable, middle ground in the controversy" acceptable to a Committee evenly divided between the major political parties. *Id.* at 9. By interpreting the Report to determine —supposedly *unambiguously*, no less—that Rep. McDermott violated a nondisclosure duty to the Ethics Committee, the *en banc* D.C. Circuit unconstitutionally usurped the "final word on the applicability and implications" of that Committee's rules. *Id.* "Such substitution of a court's unequivocal judgment for a carefully crafted political compromise flies in the face of separation of powers principles," and threatens not only to turn the judicial process into a political one, but to turn the political process into a judicial one. *Id.* at 13.

The bottom line here is that the federal courts are not, and should not become, a forum for those dissatisfied with a legislative resolution of an internal disciplinary matter "to achieve a more permanent victory than the political process allows." *Id.* at 14. The *en banc* D.C. Circuit's unprecedented conclusion that a Member of Congress violated an Ethics Committee nondisclosure duty, where the Ethics Committee itself pointedly refused to so conclude, represents a flagrant disregard for the separation of powers that warrants this Court's review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

FRANK CICERO, JR., P.C.
KIRKLAND & ELLIS LLP
200 East Randolph Dr.
Chicago, IL 60601

CHRISTOPHER LANDAU, P.C.
Counsel of Record
EDWIN JOHN U
PADRAIC B. FENNELLY
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

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BRIEF OF REPRESENTATIVES HOWARD BERMAN, BARNEY FRANK, ZOE LOFGREN AND GEORGE MILLER AS AMICI CURIAE SUPPORTING PETITIONER

Elisabeth Genn
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

Paul M. Smith *
JENNER & BLOCK LLP
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Amici
*Counsel of Record

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INTEREST OF AMICI

Congressman Howard Berman has represented the 28th District of California since 1983. He is a senior member of the Foreign Affairs Committee and the Vice Chair of the Judiciary Committee.[1] He is Chairman of the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property. He served as the ranking member on the Ethics Committee from 1997 to January 2003 and from April 2006 to December 2006.

Congressman Barney Frank has represented the 4th District of Massachusetts since 1981. For a number of years, he served on the House Judiciary Committee, where he was ranking member of the Subcommittee on Courts and Intellectual Property. He also served on the Banking Committee and the Select Committee on Homeland Security. In 2007, he became the Chairman of the House Financial Services Committee.

Congresswoman Zoe Lofgren has represented the 16th District of California since 1994. She is a member of the Committee on the Judiciary and the Subcommittee on Administrative Law, and she is the Chair of the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law. Congresswoman Lofgren also serves on the Committee on Homeland Security; the

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[1] No counsel for a party authored this brief in whole or part. No party, counsel for a party, or anyone else other than the amici and their counsel made a monetary contribution to fund the preparation or submission of this brief.

Subcommitee on Emerging Threats, Cybersecurity, and Science and Technology; and the Subcommittee on Border, Maritime and Global Counterterrorism. She is likewise a member of the Committee on House Administration, and the Chair of the Subcommittee on Elections. Congresswoman Lofgren served on the Ethics Committee from 1999 to 2003.

Congressman George Miller has represented the 7th District of California since 1975. He has served as Chairman of the House Democratic Policy Committee since 2003. He has also served on the House Education and Labor Committee since 1975, acting as the ranking member on that panel since 2001 and as Chairman since January 2007. Congressman Miller also serves on the Natural Resources Committee, and was Chairman of that Committee from 1991 to 1994.

The interests of the *amici* members of Congress are twofold. First, they have an interest in maintaining the free flow of information to Congress from persons in government and the private sector who may be deterred by the D.C. Circuit's rule that an internal confidentiality obligation may trump the First Amendment. Second, they have an interest in protecting the institution of the House of Representatives from the judicial interference arising from a court's interpretation of an internal House rule.

STATEMENT

This case involves a long-running dispute in which one member of Congress is suing another for

allegedly violating a federal wiretapping law. The claim is that petitioner McDermott violated the law by publicly disclosing truthful information about a matter of public interest because he received that information, unsolicited, from third parties who had illegally intercepted a cellular phone call. Following a remand of the case for further consideration in light of *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the *en banc* U.S. Court of Appeals for the D.C. Circuit ruled 5-4 that petitioner is not entitled to invoke the First Amendment protections recognized in *Bartnicki* because, according to the majority below, his conduct also violated a rule of the House Ethics Committee. *Amici* believe that such an argument for avoiding constitutional scrutiny is both incorrect and fraught with serious collateral consequences.

SUMMARY OF ARGUMENT

1. The Court should grant review to make clear that the First Amendment principles recognized in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), barring enforcement of a wiretap statute to punish disclosure of truthful information about a matter of public interest, do not evaporate just because the plaintiff points to some other rule that he argues barred the same disclosure. The D.C. Circuit's endorsement of such an exception to *Bartnicki* is unjustified as a matter of basic First Amendment jurisprudence.

2. The D.C. Circuit's reliance on a House rule to eliminate First Amendment protections here was particularly problematic because of separation-of-powers concerns. The courts have traditionally been very reluctant to intrude into the Legislative Branch

and interpret and enforce internal rules. This case typifies the strong reasons for maintaining that bar to judicial intrusion, except in compelling circumstances not present here.

ARGUMENT

I. THE D.C. CIRCUIT'S *EN BANC* DECISION CONFLICTS WITH *BARTNICKI* AND WILL UNDULY RESTRICT THE FREE FLOW OF INFORMATION TO CONGRESS, THE MEDIA AND THE PUBLIC.

In *Bartnicki*, this Court held that the fact that information originated from an illegal interception does not preclude an innocent third party, once in receipt of that information, from claiming a First Amendment right to disseminate it. While that right is not absolute, and depends on the nature of the information at issue and the other circumstances of the case, the protections of *Bartnicki* should not be lightly thrown aside as they were in this case. This Court therefore should grant review to consider the validity of the D.C. Circuit's 5-4 decision that First Amendment protections evaporate once a plaintiff can point to any obligation, even if not judicially enforceable, that arguably bars the speaker from disclosing the information at issue.

The D.C. Circuit ruling will have broad consequences, because there are a great many obligations that might be read to bar a speaker from disclosing information that comes into his possession. Such obligations may exist in corporations, in all branches of government, and in

other contexts as well. They may or may not be enforceable themselves under the First Amendment, depending on the circumstances. But it is quite another matter to say that the existence of such an obligation withdraws First Amendment protection, subjecting the speaker to civil and even criminal liability if a third party obtained the information improperly.[2]

Leaving the D.C. Circuit decision in place would have an adverse impact on the free flow of information to the media, the Congress and, ultimately, the American people. There are, for example, many public-spirited individuals who are willing to provide crucial information concerning health, safety and other matters even though they risk losing their jobs because they have violated a contractual or fiduciary non-disclosure obligation. But if, as the D.C. Circuit now authorizes, they will also lose their First Amendment defenses in any subsequent civil or criminal litigation, they may decline to provide the information to the media or to the Congress. The inevitable result will be a decline in transparency and accountability — values that the First Amendment is meant to promote and protect.

The *en banc* majority said it found support for its ruling in *United States v. Aguilar*, 515 U.S. 593, 605 (1995). Pet. App. 10. But that greatly exaggerates what this Court said in *Aguilar*. The Court there held that 18 U.S.C. § 2232(c) — a statute making it

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[2] Of course, some civil and criminal prohibitions are expressly and properly tied to breaches of contractual or fiduciary obligations, but this is not such a case.

illegal for whoever has knowledge of a wiretap investigation to disclose that information in order to impede interception — was properly interpreted as covering the conduct of a federal judge who disclosed the existence of a wiretap. In so ruling, the Court considered whether the statute would violate the First Amendment if interpreted to punish disclosures occurring after the wiretap ended. 515 U.S. at 605. The Court said no.

But central to the ruling was the finding that § 2232's restrictions are limited to those who disclose wiretap information "in order to obstruct, impede, or prevent" the interception, and not generally. *Id.* at 605. It was on *this* basis that the Court held the statute does not violate the First Amendment. Only as a secondary point did *Aguilar* note "special duties of nondisclosure." *Id.* at 606. That statement should not be interpreted as a categorical endorsement of the principle that one obligation to avoid disclosure voids the First Amendment as to all others that might apply.

The Court in *Aguilar* stated that "[a]s to one who voluntarily assumed a duty of confidentiality, governmental restrictions on nondisclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." *Aguilar*, 515 U.S. at 606. It cited *Snepp v. United States*, 444 U.S. 507 (1980), for that proposition. But the *Snepp* Court held that confidentiality rules *themselves* may be subject to less stringent First Amendment standards, not that a government restriction that would otherwise be unconstitutional as applied in a particular

circumstance may be rendered constitutional due to less stringent standards born of a voluntary duty of nondisclosure. *See id.* at 507-08 (noting nondisclosure restrictions of CIA employment agreement are constitutional). *Snepp* is therefore analogous to an examination of the constitutionality of restrictions associated with Rule 9 of House Ethics Committee, not to the constitutionality of § 2511(1)(c). This Court should grant review to clarify that it did not intend to go further in *Aguilar*.

Moreover, an evaluation of § 2511(1)(c) in light of what Rule 9 of the House Ethics Committee permits does not makes sense because the two provisions serve different goals. The federal wiretapping statute was drafted to protect the privacy of those using electronic means of communication. In contrast, Rule 9 of the House Ethics Committee seeks to "protect the rights of individuals accused of misconduct, preserve the integrity of the investigative process, and cultivate collegiality among Committee members." Pet. App. at 139a (Report of the Investigative Subcommittee of the House Ethics Committee, Dec. 6, 2006 ("Committee Report") (quoting Report of Ethics Reform Task Force on H. Res. 168, 105th Cong., 1st Sess., at 10-11 (June 17, 1997))).

It follows that the application of the First Amendment to each of these laws or rules might differ considerably. And the agreement of a member of Congress to abide by one should not lightly be treated as a waiver of all constitutional protections vis-à-vis the other.

II. THE *EN BANC* DECISION VIOLATES THE SEPARATION OF POWERS

Review by this Court is also imperative in order to preserve the delicate balance of power between the legislature and the judiciary that underlies our constitutional system. In holding that petitioner could constitutionally be punished under § 2511(1)(c) because, in the court's estimation, he violated an internal House Rule, the D.C. Circuit disregarded more than a century of jurisprudence that circumscribes inviolable spheres of legislative activity and requires judges to exercise great caution before injecting themselves into internal legislative affairs.

This case is, at its core, a political dispute about the proper way to address Rep. McDermott's contentious disclosure to the general public of politically sensitive information implicating other members of Congress. Allies of respondent have already sought and obtained a resolution of that dispute in the political arena. They filed a complaint with the House Ethics Committee, which proceeded to investigate the allegations of misconduct and issue a Report on the matter that reflected a nuanced political compromise among competing interests. The Committee declined to charge Rep. McDermott with any violation or to impose any sanction whatsoever. Instead, the Committee cautiously concluded that "Representative McDermott's conduct . . . was inconsistent with the spirit of the applicable rules and represented a failure on his part to meet his obligations as Ranking Minority Member of the

House Select Committee on Ethics." *See* Pet. App. 142a.

The Committee's deliberately crafted language reflects both the inherent ambiguity in applying a Rule that prohibits disclosing "evidence relating to an investigation" to Rep. McDermott's conduct in this case and the need to stake out a flexible, and politically viable, middle ground in the controversy. *Id.*, *see* Rule 9, Rules of the Committee on Standards of Official Conduct, U.S. House of Representatives, 104th Congress (1995-98). It also represents the final word on any claim for relief directly under the House Rules.

That final word on the applicability and implications of Rule 9 in this controversy is doubly deserving of judicial respect due to the unique composition and features of the Ethics Committee itself. It is the only Committee in the House of Representatives that is composed of an equal number of Democractic and Republican members. Moreover, the Committee tends to foster more deliberative decision-making than other House Committees, striving for — and most often achieving — unanimous or near-unanimous results. The Ethics Committee's findings in this case exemplify the type of politically nuanced outcome that the Committee's structure and process are designed to produce.

The fact that this case revolves around the controversial conduct of a Congressman that has been the subject of internal disciplinary proceedings does not mean, of course, that the courts cannot

enforce laws of general application governing that same conduct. *See, e.g. United States v. Rose*, 28 F.3d 181-90 (D.C. Cir. 1994). Yet in this arena, too, respondent Boehner has already obtained all the relief to which he was entitled. This Court made clear in *Bartnicki* that petitioner, standing on the same footing as any other citizen, could not constitutionally be punished under § 2511(1)(c) for disclosing truthful information on a matter of public concern when he himself was not involved in its unlawful interception. 532 U.S. 514 (2001).

Unsatisfied with these results, respondent persuaded the D.C. Circuit to give him a third bite at the apple by creating a hybrid theory of § 2511(1)(c) liability that requires the court affirmatively to reach into the legislative sphere, interpret ambiguous internal House Rules, and attach implications to political proceedings within the House that their participants could not have anticipated, much less sought. This outcome trenches on fundamental separation of powers principles. It must not be allowed to stand.

The historical reluctance of the courts to appoint themselves arbiters and enforcers of internal legislative rules reflects both a textual constitutional commitment and an institutional reality. The Rulemaking Clause in art. I, § 5, cl. 2 of the Constitution confers on each house of Congress the exclusive power to "determine the Rules of its Proceedings," and for good reason. *United States v. Ballin*, 144 U.S. 1, 5 (1892). Decisions concerning the process by which elected representatives make political decisions are themselves inherently

political. They are, in a very real sense, inseparable from the political substance of legislative activity. Based on this premise, courts have time and again rejected politicians' attempts to obtain in court the victories that eluded them on the House or Senate floor. In *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982), for instance, the court refused to impose on the House of Representatives its own interpretation of House Rules in order to declare that a statute was not validly enacted. The *Metzenbaum* court recognized that in passing the statute, the political majority had given its sanction not only explicitly to the legislation itself, but also implicitly to the process followed in its enactment. The court would not disregard the express constitutional commitment of rulemaking authority to the houses of Congress, nor show disrespect for the legislative branch of government by declaring the House of Representatives' understanding of its own rules erroneous. *Id.*

In matters that concern such purely internal political processes, House Rules are intended to be flexible and adaptive. *See* Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 726-27 (1989). Thus Congress may legitimately waive, ignore, or read out of existence a particular rule to accomplish its legislative business. Procedural rules cannot be treated as binding, enforceable norms and still retain their vital role in facilitating political compromise. Nor are they amenable to a single correct interpretation. That is why the courts have consistently refused to "interfere with the internal procedures of Congress." *Exxon Corp. v. FTC*, 589

F.2d 582, 590 (D.C. Cir. 1978). *See Ballin*, 144 U.S. at 3-9; *Marshall Field & Co. v. Clark*, 143 U.S. 649, 670-73 (1892); *Christoffel v. United States*, 338 U.S. 84, 88 (1949) ("Congressional practice in the transaction of ordinary business is of course none of [the Court's] concern . . .").

The decision below impermissibly invaded this constitutionally mandated sphere of congressional autonomy. This is not a case where the rights of persons *other* than members of Congress are jeopardized by Congress's alleged failure to follow its own procedures. *See Yellin v. United States*, 374 U.S. 109, (1963); *Christoffel*, 338 U.S. 84; *United States v. Smith*, 286 U.S. 6 (1932). Nor is this a situation where a court cannot assess the scope of a statutory prohibition except by reference to an internal House Rule. *See United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), *supplemented by*, 68 F.3d 489 (D.C. Cir. 1995); *United States v. Diggs*, 613 F.2d 988 (1979). The proscriptions of § 2511(1)(c) are set forth in the statutory language and the case law applying it. The D.C. Circuit's resort to the application of internal House Rules to circumvent this Court's holding in *Bartnicki* is thus, quite literally, without precedent.

The D.C. Circuit's approach is also flagrant in its disregard for the actual outcome of the House Ethics Committee's proceedings. The court's paean to the Committee's Report — "We agree with and accept the Ethics Committee's interpretation of the rules as applied to this case" — rings hollow for two reasons. *See* Pet. App. 13a First, the court's pronouncement ratifies the incorrect notion that a court can attach

collateral consequences to internal legislative activity as long as it purportedly defers to the legislature's interpretation of its rules. Second, the court does not actually adopt the Ethics Committee's interpretation of the House Rules but instead re-interprets the Committee's Report to support the court's conclusion that Rep. McDermott violated the nondisclosure duty in Rule 9 — a conclusion the Committee itself pointedly refused to reach. In effect, the D.C. Circuit predicates its ultimate finding of liability on what it believes the Ethics Committee must have meant to say. Such substitution of a court's unequivocal judgment for a carefully crafted political compromise flies in the face of separation of powers principles.

This institutional encroachment must be resisted not only because it threatens to turn the judicial process into a political one by embroiling the courts in internecine congressional disputes, *see Moore v. United States House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984), but also — and equally importantly — because it threatens to turn the political process into a judicial one by converting malleable internal rules, and their flexible internal applications, into judicially enforceable norms. Giving binding force to internal legislative activity or attaching implications to congressional rules and procedures beyond the political arena would have a debilitating effect on the political process. Rather than engage in the admittedly messy push and pull of persuading their colleagues to adopt their views, disaffected members of Congress would focus on staking out better litigation positions. Yet the

courts, faced with a sharply limited universe of possible outcomes, are uniquely ill-suited to serve as the arbiter of such intrinsically political disputes. Congress must be able to conduct its legislative affairs, and to discipline its members, without fear that those members who are dissatisfied with the outcomes of the political process will seek to undermine it, and indeed to achieve a more permanent victory than the political process allows, in the nation's courts. That is exactly what has happened here, and this Court must grant the Petition for Certiorari to ensure that it does not happen again.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Elisabeth Genn
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

Paul M. Smith *
JENNER & BLOCK LLP
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

Counsel for Amici
*Counsel of Record